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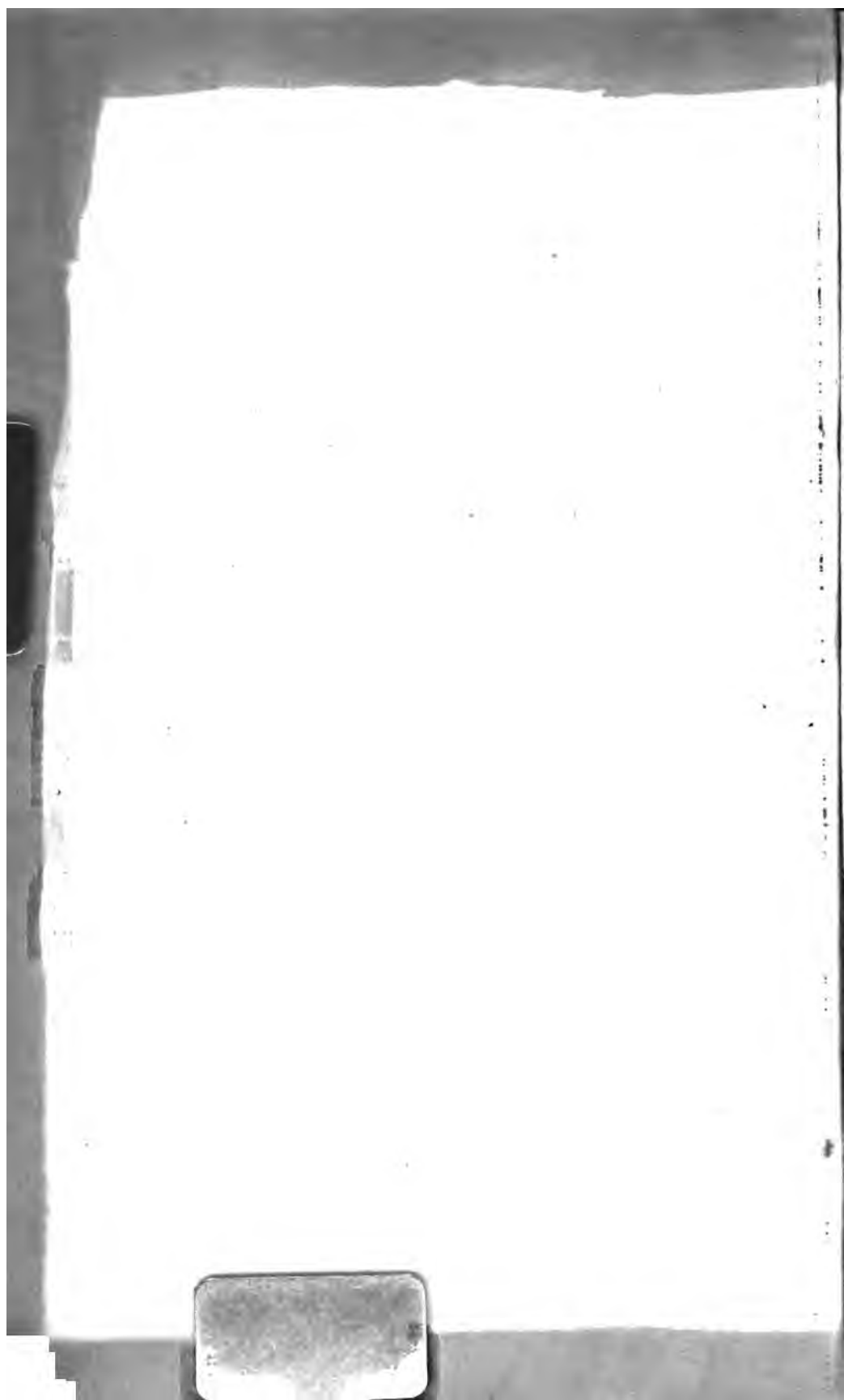
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY,
FROM
MICHAELMAS TERM, 1825,
TO
MICHAELMAS TERM, 1832, inclusive.

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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY,
DURING THE TIME OF
THE RIGHT HON. LORD STOWELL,
AND OF THE
RIGHT HON. SIR CHRISTOPHER ROBINSON.

By JOHN HAGGARD, LL.D.

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1825—1832.

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JUDGES
OF
THE HIGH COURT OF ADMIRALTY,

&c. &c.

During the Period comprised in this Volume.

JUDGES.

The Right Hon. Lord STOWELL.

The Right Hon. Sir CHRISTOPHER ROBINSON.

KING'S ADVOCATES.

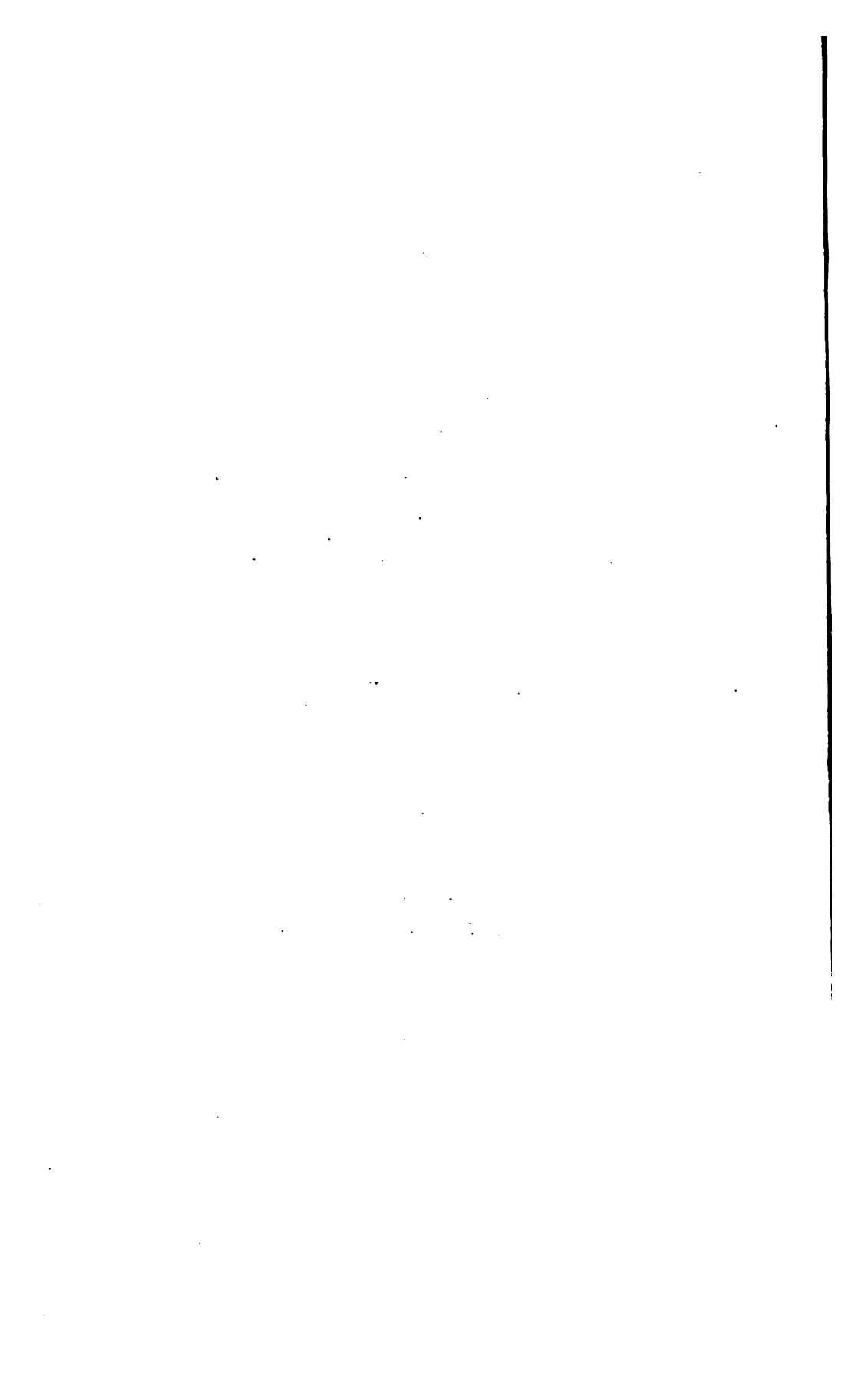
Sir CHRISTOPHER ROBINSON.

Sir HERBERT JENNER.

ADVOCATES OF THE ADMIRALTY.

JAMES HENRY ARNOLD, LL.D.

JOHN DODSON, LL.D.



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1827.

<i>May 31.</i>	ÇA IRA, CENSEUR, L'EXPEDITION,	-	-	-	Affirmed.
<i>February 2.</i>	LOWTHER CASTLE,	-	-	-	Affirmed.

ERRATA.

Page 199. line 23. Mcinholt *read* Weinholt.

281. line 8. (*in margin*) or *read on*.

345. line ult. (*in note*) for p. 16. *read see p. 259. et seq.*

REPORTS
OF
CASES
DETERMINED IN THE
HIGH COURT OF ADMIRALTY.

VINE. JAY.

Nov. 4th,
1825.

THIS ship, in distress near the *Needles*, was assisted for three days and nights and towed into *Portsmouth*. There were thirty sailors, the first eight that reached the ship were employed on the coast-guard service under the command of Lieut. *Porter*, R. N.; but he did not accompany his men. A separate claim, of salvage being given for this officer, it was alleged on his behalf, "that his men had proceeded under his directions in the revenue galley to the assistance of the vessel, that he gave them instructions and also sent off a pilot boat to aid their exertions." A contrary statement, on the part of the owners, was supported by affidavit. The vessel and cargo were valued at 5500*l.*, and a tender of 250*l.* had been refused.

Under the general rule, that a person not actually occupied in effecting a salvage service is not entitled to share in a salvage remuneration, the claim of an officer of a coast guard detachment, who sent his men and boat, but did not assist in person, rejected.

JUDGMENT.

Lord *Stowell*, — after having awarded 400*l.* as a salvage remuneration, thus proceeded: The claim

VIII.

Nov. 4th,
1825.

of Lieut. *Porter* is quite novel. It is, I apprehend, a general rule that a party, not actually occupied in effecting a salvage service, is not entitled to share in a salvage remuneration. The exception to this rule that not unfrequently occurs is in favour of owners of vessels, which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed.* But in this case what did Lieut. *Porter* do? He permitted the men under his command to perform with the boats a salvage service; and on the ground of policy I think that officers of the preventive service should suffer their boats to assist vessels in distress; but such a permission may have its inconveniences, and it may sometimes be a matter at least for consideration how far the men, employed in protecting the revenue, ought to be allowed to quit the particular service for which they are engaged. The nature and duties of this arduous service are however a sufficient reason for Lieut. *Porter* not going out in person to the assistance of this vessel: but to acknowledge him as a salvor would be to introduce a sort of prize principle very inapplicable to cases of this description. In cases of prize, a commander on shore, if the capture takes place within the limit of his station, is considered as the manager of the whole transaction, and, the property being condemned, is entitled to his proportion; but, in questions of salvage, the Court must not act on the same liberality of principle that belongs

* See the *Mulgrave*, GARBUTT, *infra*, p. 77.

to prize cases. Here all is to be paid out of the pockets of the *British* owner; — he alone has to discharge all demands. The application, I repeat, is novel; and, in dismissing it, I go as far as I can in allowing Lieut. *Porter* his expences.*

VINT.

Nov. 4th,
1825.

* BRANSTON. WILSON.

June 26th,
1826.

This brig, homeward bound, got into distress; and a lieutenant of the royal navy, a passenger on board, contributed his assistance; and claimed to be remunerated for his services.

Claim of a passenger to salvage not sustained.

Per CURIAM.— Where there is a common danger, it is the duty of every one on board the vessel to give all the assistance he can; and more particularly this is the duty of one whose ordinary pursuits enable him to render most effectual service. No case has been cited where such a claim by a passenger has been established; though a passenger is not bound, like a mariner, to remain on board, but may take the first opportunity of escaping from the ship and of saving his own life. I reject the claim.

UPNOR. HADLOW.

May 2d,
1826.

ON the 15th of *June* the mast of a vessel was observed on the *Grain Spit* close to the *Nore Sand*, by five men who with much difficulty reached her: they found the water over the upper dead eyes of the shrouds, the sails (except the mizen) washing about; no person on board, and no anchor out. The men with other assistance were employed till the evening of the 18th, in securing the wreck and bringing her to *Sheerness*: she proved to be a flat-

Salvage refused for bringing into a port a barge found (without anchor or crew) aground, where it was a common usage to leave barges.

Upnor.

May 2d,
1826.

bottomed barge laden with manure : the agreed value was 250*l.* ; and the action for salvage was entered in 70*l.*

The owners alleged " that on the morning of the 15th, in a breeze of wind, the barge safely grounded on the inside of the *Spit* ; that the master and lad, who navigated her, having made all safe went to the owners at *Rochester*, who, on the same day, sent another barge, the *Edgar*, to her assistance ; that the sea prevented this barge reaching the *Upnor* till the next morning, when those on board hailed the men in the *Upnor* to go about their business ; that the *Edgar* then went away to wait for a change of wind, and did not return till after the *Upnor* had been taken to *Sheerness* ; that it was a very frequent occurrence for barges to ground upon the *Spit*, and in other parts of the *Medway*, where they remain in perfect safety till they can be conveniently floated off." This practice was denied by the men, who alleged, that on the 16th they communicated with the owners of the *Upnor* by letter, but that no answer was returned.

Lushington, in support of the demand.

Dodson, contra.

JUDGMENT.

Lord *Stowell*. — The affidavits are very conflicting ; but I do not think that the evidence is sufficient to support the claim of salvage. It seems a perfectly novel demand. Much reliance has been placed upon the affidavit made by the agent for *Lloyds*, and he certainly expresses a strong opinion that it is unusual to leave barges in the state in which the *Upnor* was found ; but what materially detracts from the merit of this affidavit is, that he

is also agent for the salvors. It appears to me satisfactorily proved, that it is a common case for vessels to be left on this sand; and I think that individuals, who thus choose to expose their property to the chance of wind and weather, have a perfect right to exercise their own discretion upon the matter, and that other persons are not entitled to interfere. This sand has, it is represented, been resorted to as a landing place almost from time immemorial. Here has been an interruption of a common usage; and if I were to pronounce this to be a case of salvage it would create a very considerable alarm. I dismiss the owners, but, upon the whole, shall not allow them their costs.

Urton.

May 2d,
1826.

LADY CAMPBELL. BEETHAM.

February 23d,
1826.

THIS was a suit brought by *George Gower*, for his wages, first as cuddy servant and afterwards as steward of the *Lady Campbell*. The owner rested his defence on three grounds. 1st. Intoxication and the consequent incapacity of the steward to discharge his duties. 2d. Embezzlement or destruction of table linen entrusted to his care. 3d. That on the arrival of the ship at *Blackwall*, he quitted her before he was entitled.

Occasional acts of drunkenness, not more than usual with sailors, and latterly (when more frequent) arising from the undue force given by bodily disease to the moderate use of strong liquors, will not enure to the forfeiture of a steward's wages.

Dodson, for the mariner. *Prima facie*, the duties were discharged. He quitted the ship with leave. He cited the *New Phœnix*, LEWTHWAITE *, for the

* Vol. i. p. 198.

LADY
CAMPBELL.

February 22d,
1826.

general principles applicable to cases of this description.

Lushington, contra. The indulgence shown to the infirmities of a common man, cannot, without injury to the service, be extended to a case of this kind, where a man is paid high wages, and placed in a very responsible situation.

JUDGMENT.

Lord *Stowell*. — This action is brought by a mariner against *George Beetham*, the captain, and finally the owner of a vessel called the *Lady Campbell*, which proceeded as a private merchant ship, on a voyage from *London* to the *East Indies*, in *March* 1823, and back again to the port of *London*, late in the following year. Though a private ship, she was nearly 700 tons burthen; she carried out a cargo and about forty passengers, persons in various ranks and conditions of life, and, as far as it appears, was properly equipped in all respects for the voyage and the return. But she had the misfortune to encounter, in a very early stage of her progress, such tempestuous weather in the *Bay* as compelled her to seek refuge in the port of *L'Orient*, where she remained about six weeks. *Gower*, the mariner, was employed in her at this time in the capacity of a cuddy servant, and so continued until their arrival at *Madeira*, where his immediate superior, the captain's steward, having incurred the displeasure of the owner, was removed from his station, and *Gower* was promoted to fill it; an occurrence which carries with it an inference that no displeasure of the captain had then affected him, but rather the contrary. In this station of preferment he continued till the arrival

at *Calcutta*, having made a short stay at the *Cape of Good Hope*, and likewise at *Madras*, where she deposited several of her passengers and parts of her cargo. At *Calcutta* he was advanced to a higher rate of wages for the return voyage, as were all the other mariners likewise on board the ship, of which Mr. *Beetham*, the captain, was now the owner by purchase. It does appear that at the time of making the advance of wages, some expressions of the owner's displeasure at *Gower's* past conduct broke out from the captain, but the only imputation thrown upon him was that of having been neglectful; no charge whatever is made of habitual drunkenness, which habit, if it had existed, must have formed the most prominent as well as the gravest subject of reproach. His answers to this reprimand demonstrate that no such charge was then made to him, for it consists only of a denial to the charge of neglect, and an assurance of future diligence in his conduct; but nothing that then passed between the parties carries with it the most distant allusion to any habit of frequent intoxication.

I learn from one of his two witnesses that he had been drunk once or twice on the whole of the outward voyage, which lasted nine months. Now though this Court does not mean to countenance any criminal excess of that kind, yet it cannot so far blind itself to the ordinary habits of men living for such a length of time in a frequent condition of extreme peril and fatigue, as to feel much surprize that a seaman, having the command, as this man from his station had, of strong liquors, should have been betrayed into two acts of indulgence of that nature, nor can it consider them as sinking him below the common average of

LADY
CAMPBELL.

February 22d,
1826.

LADY
CAMPBELL.

February 22d,
1826.

a seaman's morality. I am, upon the whole, almost disposed to adopt the conclusion of this adverse witness, that he did his duty in the main very fairly : and when it is pressed that the steward has more responsibility in his station, than a common sailor in the ship, it is not to be forgotten that in times of extreme danger and fatigue he is expected to take some share in the ordinary functions of a mariner, and that if stronger obligations of duty arise from his situation of trust, he is more exposed to the dangers of undue indulgence from his ready access to the means of gratification.

It is, I think, no slight proof against the charge of frequent intoxication, that no such act is alleged to have been committed at the *Madeiras*, or the *Cape*, or at *Madras*, or at *Calcutta*, the port of repose, (and, as such, generally of that species of indulgence,) where he received another advancement in the matter of wages. I think the fact of his being not only continued, but advanced, first in station at the *Madeiras*, and afterwards in wages at *Calcutta*, proves that he cannot be justly deemed that incorrigible sot who was rendered incapable of performing his necessary duties. At such a place as *Calcutta*, and even on board his own ship, it is quite impossible that the captain could not have found one to supply his place much more sufficient to perform its duties ; but instead of a dismissal he shares in the advance of wages which were allowed for the very purpose of inducing the mariners, himself among the number, to continue in the vessel. Upon the view of all that is alleged to have happened, from the commencement of the voyage to their arrival at *Calcutta*, and during their stay there, to their return to *Madras*, I think

myself justified in pronouncing that nothing is proved that can fairly fix upon this person the imputation of habitual drunkenness; it is only in the latest stage that such a degree of this species of criminality is attempted to be proved, as ought, when proved, to vacate solemn contracts between the parties, executed in all the forms required by the law.

LADY
CAMPBELL.
February 22d,
1826.

In observing upon this charge of drunkenness, I think it would have been entitled to more acceptance if it had conformed to that distinction of time to which the evidence, as far as it applies, can be deemed to apply with any effect; the general preponderancy of the evidence referring to antecedent periods, is, I think, exculpatory, upon the grounds I have stated. In the latter stages of the history, this man appears to have laboured under a great degree of bodily disorder, which discovered itself first at *Calcutta*, and advanced progressively; and, in the latter part of the return voyage, most rapidly, so as to render him often incapable of performing his duty, from a large and painful swelling in his neck. It is proved that in the voyage from *Calcutta* to *Madras* he was extremely cautious of liquor, as tending to inflame his disorder, and was on that account abstemious with respect to the use of liquors: in that part of the voyage from *Madras* to the *Cape* the disorder appears to have increased still more, and possibly increasing debility, though requiring something more of immediate support, rendered less effectual his resistance even to the most temperate use of strong liquors. At the *Cape*, his neck appears to have been considerably inflamed, and continued in a very aggravated state during the return, so as occasionally to prevent his

LADY
CAMPELL.

February 22d,
1836.

execution of the duties of his office; from which, nevertheless, he was not deposed, but was expected to discharge them even after its termination. Now, though it may be true, and I believe is in fact so, that such disorders about the throat and neighbouring parts are sometimes produced by habits of intoxication, yet they do not invariably spring from the same cause: the same effect not unfrequently arises without any preceding connection with such habits; and, when I do not find, by the history that I have detailed, that such habits did precede this disorder, I am indisposed to admit that the disorder proceeded from such habits. If a medical opinion upon the fact of the connection between the habit and the disorder had been properly vouched by the medical person who had himself observed the progress of both, such testimony would have been highly material; but no such person is produced, and I think the connection appears to stand contradicted by the history of the case: and even if this should be at all questionable, which I think it is not, it would be a question which the opinion of a surgeon, so delivered at a second-hand, could not be permitted to decide. The fact that the steward was not superseded from his office is more than a counterbalance to an opinion so conveyed.

Another charge is founded upon an asserted fact of the waste and destruction of the linen entrusted to his care, amounting to a considerable value. It appears that, upon the termination of the voyage, a great deficiency was found, but I see no evidence that affixes this deficiency to any embezzlement or negligence imputable to the steward. No embezzlement is charged upon him, the fact

contended to be proved is the deficiency. Now it must be observed, that this person did not succeed to the office of steward until the arrival of the vessel at *Madeira*, where the former steward had been discharged, certainly not on account of his merits. In what state these things were at this time is not proved; how many of these remained to be transferred after the stay of six weeks at *L'Orient*, or, indeed, at the *Madeiras*, does not appear: the only evidence that no spoliation had been committed at *L'Orient* is that of the captain's two witnesses. The purser states, that he had not seen or heard of any; and, it is not very likely, that, if such an act had been committed, it would have been committed in any such manner as to convey itself to the ears or eyes of that officer: he likewise states, that he delivered the list of the goods contained to the present steward, but it is repeatedly denied by the steward that he received any such list, which is the less improbable, because the transfer appears to have been made without the superintending eye of this officer to see whether the goods corresponded at that time with the list that had been delivered to the preceding steward. By whom this list was examined and certified at the time of the delivery (if such delivery took place), does not appear: no such attention seems to have been used by the captain himself, or the purser, or other person whose duty and interest require a formal and accurate superintendence at the delivery of the articles. The part of them which perished under the wear and tear of so many months, upon the outward and homeward voyage — of a year and a half's use — of so many persons, must, at least with respect to the smaller articles

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be considerable, and some of the larger may be presumed to have suffered no inconsiderable injury from the operation of the same causes. But I think the fatal deficiency of the charge upon this individual for the loss, whatever it may be, arises from the slovenly and negligent manner in which the transfer was made to him, without any comparison of the things delivered with those enumerated in the list, if any such list then existed. The schedule now exhibited is certainly of no authority, being not verified upon oath, and cannot possibly affect the present party, who received the goods at a distance of time and after an intermediate possession.

Upon the whole consideration of this case, the proof of delinquency on the part of this mariner does not appear to be supported by sufficient evidence, so as to invalidate the repeated contracts. On the outward voyage no imputation rests upon any solid authority, nor at any station to which the ship arrived upon her return, till her arrival at the *Cape of Good Hope*. There this man is charged with a commencement of habits that produced infirmities. Of the numerous passengers, not one individual is produced, nor any of the numerous crew, save the captain's immediate officers — the mate and the purser, and the testimony of one of these, a very fair and intelligent witness, is repugnant to the charge. I think there occurs in many parts of the evidence a deficiency of particular and authentic intelligence which the Court ought to have received, and no account is given in at the end of the voyages of any preliminary conversation, that led to the diminished offer of 40%. To the party and to the Court the offer is presented in the form of, "Here is 40%. for you, and if you don't

accept it, you may go away ;” no explanation passed at the time, nor was any reference made to former explanations, nor to the grounds and considerations on which that particular sum is offered. These defects in the evidence have been occasionally in argument attributed to the dispersion of the witnesses, the surgeon, the passengers, and the people of the crew. If it is so to be accounted for, it is the misfortune of the captain and owners, and cannot be taken into the account, so as to act to the disadvantage of the other party ; and I think I should much exceed the proper bounds of judicial caution, if, upon evidence so defective, I should withhold from this unfortunate person the benefit to which he is entitled, not only by repeated contracts, but by those contracts likewise confirmed by the master’s continuation of him in the office after full and fair opportunities of his removal from it.

It cannot be denied that there are discordances in the evidence which do not admit of any natural and easy reconciliation, and which must be attributed to the natural effects of those habits which frequently discolour evidence upon such subjects ; but my opinion is, that there is a preponderancy upon the evidence in favour of the claim ; for that evidence fairly taken, exhibits the claimant as a person on the outward voyage not more than usually subject to the common habits of seamen. It would seem that it was not till after leaving *Calcutta* that his bodily disorder broke out, and produced a degree of weakness which gave an undue force to the influence of strong liquors, even moderately used ; that the bodily weak-

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ness itself, together with the effect, naturally increased upon their arrival at the *Cape*, and upon the following voyage, and that the fair result of this evidence is, that this person is rather to be considered as the victim of bodily disease, than of an habitual resort to a gross and disabling intemperance. I am the less inclined to enter more particularly into these inquiries, which contain some other charges of an inferior order, because it appears to me that the substantial difference between the parties is reduced to a very small value. The original sum demanded by the steward amounts to something above 89*l.*, from which are to be deducted the payments he has already received, which I shall refer to the registrar; they seem to amount to about 25*l.*; there must be likewise deducted the three sums of 15*s.* each, which do not appear in the articles, and which this Court cannot enforce upon that account.* If these sums are tolerably correct they will make a reduction of 26*l.* or 27*l.* from the sum demanded by the steward; the parties have likewise offered 40*l.*, to which offer I shall certainly hold them bound; so that in

December 28th,
1826.
A plea of set off,
in answer to a
suit for wages,
rejected.

* The purser of the *Lady Campbell* had also sued for his wages; and, in answer to his demand, the owner pleaded, as a set off, that 183*l.*, a sum which exceeded the balance claimed by the purser, was due to the owner for the passage of the purser's wife. The allegation was opposed.

Per CURIAM.—This Court cannot enter into the merits of this plea: at least I have no recollection of a plea of this description being here received. In cases of wages the Court has an admitted jurisdiction; but this is a question of passage money. The owner must sustain the inconvenience of setting forth his claim in another Court.

The Court rejected the allegation; and pronounced for the wages (admitted in Court to be due) and costs.

THE HIGH COURT OF ADMIRALTY.

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fact the whole disputed sum is reduced to about 29*l.*, or thereabouts, and this upon a voyage to the *East Indies* and back again, for full eighteen months' continuance.

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I refer these accounts to the registrar with these directions, which I trust will, upon every consideration of prudence, terminate the present controversy.

EALING GROVE. FALCONER.

June 13th,
1826.

THIS was a cause of wages. The summary petition alleged "that in *December 1824* the *Ealing Grove* being bound on a voyage from *London* to *Dominica*, *James Carman* was hired as a seaman for the voyage, and signed the usual articles; that the vessel arrived at *Dominica* on the 11th of *February 1825*, and there discharged her cargo; that on the 13th, while the ship was at *Dominica*, the chief mate gave *Carman* and two other seamen leave to go on shore, which they did about 3 o'clock P. M.: that there being at the time no urgent duty on board they did not return that night; but about 11 o'clock the next day, as they were returning on board, they were taken into custody at the instance of the master upon a charge of desertion; that they were committed to prison, and for the first forty-eight hours were not allowed any thing to eat or drink. That *Carman* remained in prison seventy-five days, and became ill from the badness

A sailor's wages and expences pronounced for: as getting drunk on shore (at *Dominica*) and not returning on board immediately leave of absence expires (his clothes and other property being on board), is not an act of desertion working a forfeiture of wages; and is amply punished by 75 days imprisonment in the island, when the man was willing to return to his

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of the food ; that on the 1st of *May* the master ordered him on board in his weak state, but would not permit him to do duty on the homeward voyage, informing him if he attempted it, he would blow out his brains. That the ship arrived at *London* in *June* 1825, and earned considerable freight."

It was pleaded, *contra*,—"That *Carman*, on 27th *December* 1824, while the ship was coming to an anchor in the *Downs*, and on many occasions during the voyage, conducted himself in a disobedient and mutinous manner, and refused to do any duty ; that in consequence of his general bad conduct, and on account of his not returning to the ship at *Dominica*, on the evening of the day on which he went on shore, the master and chief mate caused him to be apprehended ; that *Carman*, upon being brought before the magistrate, replied in a most insolent manner, that he acknowledged no law or authority over him in the country, and refused to return on board ; whereupon he was committed to gaol."

The allegation further pleaded, "that by an act (passed at *Dominica*, in 1804, and confirmed by an order in council,) entitled "An act to prevent masters of vessels from carrying debtors or their effects from off this island, and from leaving their seamen on shore, &c., and to empower justices of the peace to determine disputes between masters and seamen," sect. 11. & 12. it is enacted, "that on complaint being made to any justice of the peace of the island by the master of a vessel, that any of his seamen hath deserted without the leave of such master, or, having come on shore with leave, or on duty, and refused to return on board, such justice is authorised and required to issue his warrant for

the apprehension of the seaman, and to determine the difference, if any there may be, between the master and seaman, and to order the seaman to return on board; and, in case of refusal, to commit him to gaol until he consents to return on board, or the vessel is ready to sail, when, on the application of the master, the seaman is to be delivered to the master, he, the master, paying all lawful fees and expences, which he is authorized to charge against the seaman's wages, or so much thereof as the justice, before whom the seaman was originally carried, shall direct. That if any seaman not usually residing in the island shall be found on shore while the vessel to which he belongs remains in any of the ports or bays of the island, and the master of such vessel shall refuse to take him on board, on proof thereof being made on oath before one justice of the peace of this island, such justice may direct a constable to put the said seaman on board of the vessel at the expence of the master thereof; and if such seaman shall remain on shore after the departure of the vessel from this island, the bond entered into by the master and his sureties is forfeited. That the bond is required by the act to be entered into by all masters that arrive at *Dominica*, before clearing out of their vessels, with two sufficient sureties, by which they become bound to His Majesty, &c. in 1000*l.* sterling; conditioned, among other things, that provision be made for sailors or other persons brought to the island, that they do not become chargeable to the public, or be found destitute or begging within six months after the departure of the vessel." The allegation pleaded "that such bond was entered into by the master of the *Ealing Grove*; and denied that *Carman* was prohibited

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from doing duty on the return voyage, or threatened with personal violence; but that he was not required to do duty, inasmuch as he was considered as not belonging to the ship."— This allegation was admitted after argument; and a responsive plea being afterwards admitted, the cause came on for hearing upon the effect of the evidence. The sum demanded was 10*l.* 17*s.*

Lushington for the mariner.

Jenner, contra.

JUDGMENT.

Lord *Stowell*. — The numerous and bulky papers in this case contain a question of small importance in pecuniary value, arising upon a claim made by a seaman against the part-owner and master of the ship *Ealing Grove*, as the residue of wages yet due for a voyage from *London* to *Dominica*, and a return voyage to *London*. The rate of wages is not disputed, but the payment is resisted upon the assigned grounds of misbehaviour during the outward voyage, and an act of desertion committed at the Island of *Dominica*, where the seaman suffered an imprisonment for no less a period than seventy-five days, and was then brought to *England* without wages, or any permitted labour in his capacity of a seaman.

One circumstance at the outset of the voyage is stated by the captain, which, I confess, has produced rather an unfavourable impression upon my mind, in a case where I think there are just imputations on both parties. It is alleged by the captain, that upon an occasion happening in the *Downs* on the outward voyage, this mariner was guilty of a neglect of duty in what is termed a

paying out of the cable. The mariner alleged as an excuse, that there were too many men already employed in that business; that they were in each other's way; and that therefore he retired from that service to make preparations for the ship's breakfast, of which the time was very near. The captain did not admit of this reasoning, and ordered him back to his employment, which order he obeyed, but not without using expressions of a very mutinous and disorderly nature; such as, "that he would not obey any orders but such as he himself approved, and that he would not be controlled by the captain." These words are not proved; but taking it that such words were used in the hearing of the captain, I cannot but think that he comes with rather an ill grace to require from the Court any redress for subsequent ill-behaviour, after having suffered such outrageous behaviour as this to pass with perfect licence and impunity, when it was perfectly not only within his power, but, as I think, within his duty, to give himself redress by an immediate discharge of the seaman. This was at the very outset of the voyage, in the *Downs*, where it was easy to procure another mariner, able and willing to do the duty which this man had declared he would not do, though he had signed articles to a contrary effect a day or two before, and had obtained, for that reason, the terms of payment which he himself had dictated.

A previous circumstance had occurred, which is represented, in the evidence, as having given an undue provocation to the captain, and to have led to all the unfortunate consequences that followed at *Gravesend*, where the articles were signed. It was proposed by the captain that they should be signed for 45s. the month. Some of the men ob-

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jected to this, as being below the common rate of *West India* wages. *Carman* headed the party that objected, and refused to subscribe the articles for less than 50s. ; and this being resisted for some short time by the captain, the objecting party called a boat, took their clothes with them, and were quitting the ship, when they were recalled by the captain's submission to their demand, and they executed the articles. I find no reason to believe that their demand was not justifiable by the common usage at that time prevailing ; but it is alleged that the captain felt differently ; that the demand excited strong resentments in his mind, which occasionally broke out in harsh treatment of this individual, whom he considered as the leader of the opposition ; and I cannot say that there is nothing in the evidence to countenance a suspicion, that such was the effect upon the mind of the captain.

After leaving the *Downs* the voyage proceeded prosperously, but not without occasional interruptions of the peace of the ship, by jarrings between the captain and this mariner, who certainly does not appear to be a man of a soft and yielding temper, but, as one of his witnesses describes him, "a wrangle-some chap." At times, another witness says, "that on account of the dispute about wages, the captain and chief mate were always foul of him. The man tried to be peaceable enough, but they were always jawing of him, and finding fault with him without any occasion." Some incidents during the voyage are mentioned to his disadvantage. He one day brought up a piece of beef with a complaint that "it was not altogether so good;" but it rather turns out upon the evidence to be a complaint that he had no vegetables with it, the beef being at the

bottom part of the cask, where it is inferior and rather unsavoury without such an accompaniment, although not unwholesome; for I think it is to be admitted, that the larder on board this ship was very decently provided.

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It is stated likewise that when they approached *Dominica* he neglected or refused to reef the top-sails; but the proof is, that he was employed in other duty and did not refuse to execute this; and the charge concludes, I think rather ludicrously,—that he endangered the safety of the ship by calling off the attention of the captain from the care of its preservation, by irritating him. There are two or three other incidents that occurred in the voyage, pretty much of the same nature, which shew him to be, whether justly or unjustly I will not say, very obnoxious to the resentments of his captain. Upon the last of these occasions he requests his dismissal from the captain, by saying,—“Sir, it is quite clear that you and I cannot agree; therefore, I hope, when we get to *Dominica*, you will give me my discharge from the ship.” This was no unfair demand on the part of this person, particularly if he conceived himself to be a marked man, treated with peculiar unkindness. The answer of the captain, vouched by two witnesses, is worthy of more remarks than one, who says, “I give you your discharge, you damned rascal! I’ll work the fifty shillings out of you first.” In the first place, it proves that there was no complaint against the person that called for his discharge—it is rather a declaration of general amnesty. In the next place, it is a confirmation of what is alleged, that there was a root of bitterness remaining in the mind of the captain, on account of the original sin of the fifty shillings.

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After entering the port of *Dominica*, and discharging the cargo, an occurrence took place which is repeatedly charged as an act of desertion. It appears that two men, *Carman*, and a younger seaman by the name of *Falconer*, prayed leave of the chief mate, who was then in command of the ship, to be permitted to go on shore in the boat; to which he replied, "by all means, but you must come back by gun-fire in the morning," as *Falconer* understood it, but, as the second mate describes it, "gun-fire or sun-set in the evening," which I think the more probable. *Falconer* describes their conduct on shore in terms of great apparent truth and sincerity; he says, they went to a place of entertainment, where *Carman* and he got very drunk; what became of *Carman* that night he knows not, but he himself slept all night under the table, never heard the gun fire, and if he had, could not have got out, being fast locked in the room; in the morning *Carman* joined him; they sallied out and met another mariner, named *Bryan*, who had likewise come on shore the previous day in another boat; they agreed to go to the canteen to see the soldiers; there, again, he says, they adjourned into a grog-shop, where they repeated the excesses of the night before, two of them getting completely drunk, and *Falconer*, as he describes it, three parts drunk, where they were met by the captain and civil officers, carried before the magistrate, and charged with desertion.

Now, certainly, this conduct of theirs was criminal, and, as such, a just subject of punishment. It was an immoral act, it was a gross abuse of a covenanted indulgence; but as to the crime of desertion, it no more resembles that than it does

a robbery or a murder. They had left all their clothes on board, and made no preparations, and their conduct on shore was the very reverse of what must have been the conduct of men meditating an escape; and if they had suffered a few days confinement, and abstinence particularly from the use of liquors, and had then been sent on board the ship by order of the magistrate, few people would have thought them treated with undue severity, notwithstanding all the indulgence generally shown to the habits of such men, in resorting to the grosser pleasures on shore after the fatigues of a long voyage, the cargo landed, and the ship put into a state of perfect security.

What the conduct of these men before the magistrate was is hardly worth inquiry; they were not in a responsible condition, and what they might say could be deemed little better than the effusions of so much liquor. *Falconer* is remanded to the ship, to which he professed himself willing to return; the other two were sent to prison; one of them, *Bryan*, after six weeks imprisonment, was permitted to return to the ship, at the intercession of the captain; the other was continued for nearly the space of three months, till the ship left the island, and he was then put on board and brought back to *England*, not as a seaman, but as a prisoner or passenger, sent under the authority of the magistrate, not being permitted by the captain to resume his connection with the ship, or to perform any work, or earn any wages during any of the return voyage.

It is impossible, I think, not to consider this as treatment extremely harsh, — to be shut up in the

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loathsome prison of a very limited island, fed scantily with wretched and unwholesome fare, (for which, nevertheless, he was to pay at the rate of near a shilling a day), affected in his health by such confinement, and with hardly any society but an occasional visit from some of his associates belonging to the ship. I think it is extremely difficult to find a sufficient justification for such treatment. Two justifications are attempted — one is, that he himself refused to go on board the ship during the whole of this time, and that he preferred the *squalor carceris*, with all the discomforts attending it in this warm climate, to the ordinary course of his employment, as a free mariner, on board an *English* vessel. It would argue such incredible perverseness of mind, such a contradiction to all natural feelings, that hardly any evidence could be admitted to substantiate it; but, in fact, the evidence inclines strongly the other way. He is proved to have declared his wish to be restored to the vessel; and, in fact, the turn of the evidence on the part of the captain is rather to show that it was the captain himself who opposed his return. A more favourable season of the year was coming on, when the expense of a mariner could be better spared, and the obnoxious fifty shillings recovered by that act of parsimony. It was, besides, in the power of the magistrate, at the instance of the captain, to have sent him on board without at all consulting him, as is the usual practice in such distant colonies where seamen prove refractory; it must have been by an understanding between the magistrate and captain, that this remedy was not applied in the present case, and this seaman left to

languish in a prison, instead of being usefully employed on board the vessel to which he had committed himself.

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But another justification is resorted to, that the captain had given a bond, with a penalty of 1000*l.*, for leaving any of his mariners upon the island; for it seems it is the law of *Dominica*, that a captain is compellable to give such a bond, and that this captain had been so compelled. Now, I hope I do not violate the respect due to the authority by which this privilege has been conferred, when I observe, that its misapplication may produce very inconvenient consequences: a penalty of 1000*l.*, which was the penalty of the bond given, seems rather, on the part of the island, to invite desertion, for it is a sum very greatly exceeding the possible expence which the island could incur. By one or more mariners being left upon it, their island treasury would be a gainer by it. In the next place, it may bear hard upon the captain, by imposing upon him a disability of discharging any seaman, however refractory; and as to its pressure upon the seamen themselves, I think the facts that I have stated respecting this unfortunate mariner sufficiently show the oppressive severity with which the exercise of such an authority may be inflicted.

It appears, that the magistrate sent this man on board, to return in her to *England*, and he could only be sent by the magistrate to that ship, as a mariner belonging to that ship; in that character he is re-instated, for he had no power to send him in the character of a prisoner. However, in the latter character he seems to have come to *England*, not being permitted to do any duty on board, though

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extremely willing and desirous, having so expressed himself to more than one person ; and his sufferings are completed by his returning penniless to *England*, after having been compelled to pay for his miserable subsistence in the prison, for the space of near three months.

Upon the whole, I am not conscious that I can do more than direct a very moderate compensation for the sufferings of this individual, when I pronounce him entitled to the wages for which he sues, together with the necessary expences incurred in recovering them.

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1826.

MARY. ARDLIE.

Motion for leave to enter an appeal, in a suit for wages, from a decree of the Vice Admiralty Court at the Cape 18 months before, refused ; no sufficient circumstances being stated.

THIS was an application to enter an appeal, in a cause of wages, from a decree of the Vice Admiralty Court at the *Cape of Good Hope* ; the decree was made on the 3d of *December* 1824.

Joseph Murrz, in his affidavit, deposed : — “ that he was a native of *Lisbon*, and was hired in *January* 1824, and signed the ship’s articles as a mariner (at the rate of 4*l.* 10*s.* per month), on board the above ship for her voyage to *London* : that the ship sailed with cargo, touched at *Madras*, and on the 9th of *July* 1825 was wrecked near the *Cape of Good Hope* : that while in the service of the ship, the deponent was dangerously ill, and, so continuing, was unable to assist the rest of the crew in saving the cargo and materials : that by the end of *October*

the rest of the crew had succeeded in saving a great part of the cargo, most of the rigging, sails, and provisions, and the hull of the ship, which were ultimately sold, and the proceeds of the hull, rigging, and sails, were more than sufficient to pay the whole of the wages of the deponent and his ship-mates; but that the same not being paid, a suit was instituted at the *Cape*, in which wages were pronounced due as far as freight had been received, viz., till the arrival of the ship at *Calcutta*: that the deponent, being thereby deprived of any relief, entered on board the *Vansittart*, and continued in her service till her return to *London*, about three weeks ago: that the owners of the *Mary* having since refused payment of his wages, the deponent is now informed, that, owing to some trifling informality in the proceedings of the professional persons employed by the mariners at the *Cape*, in not interposing an appeal, his only remedy is to apply to this Court for its permission to appeal." The affidavit further stated the good conduct of the mariner while in the service of the *Mary*.

Addams, upon this affidavit, moved on behalf of the mariner, and referred to the *Neptune, Clark* *, to show that the mariner, if the appeal were entertained, would be entitled to a decree for wages to the time of the wreck.

Jenner and *Lushington* for different part-owners. The owners and underwriters have settled the whole accounts. There was no previous intimation of an appeal; and if it were now admitted, it might lead to endless litigation, and the owners be involved

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 * Vol. I. p. 227.

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in great loss. When the vessel was in distress, the conduct of the crew was highly reprehensible.

Per CURIAM. — I do not think that the circumstances laid before me are sufficient to justify a permission for entering an appeal : and I reject the application.

Motion refused.

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1826.

BETSEY CAINES. WILSON.

In a cause of collision the protest of the master of a foreign vessel, which being in distress was in tow by the vessel run foul of, is *res inter alios acta*, and not admissible evidence where no necessity exists. The Court may order compensation for consequential damage.

THE *Minerva*, while assisted by the *Flora* in towing a foreign vessel into *Yarmouth*, was run down by the *Betsey Caines*. In the protest by the foreign master (attested by two of his seamen), it was stated, “ that he saw a large brig (the *Betsey Caines*) running before the wind towards them ; that he hoisted a lantern and repeatedly hailed her ; but that she continued her course, ran foul of the smack *Minerva*, and sank her.” The owners of the *Minerva* brought a suit for the collision, and annexed a copy of this protest to the third article of their libel. The fourth pleaded, “ that the smack was of 48 tons burthen, of the value of 500*l.*, and that at the time of the collision she had a cargo of fish worth 100*l.*, and other effects on board worth 75*l.* ; that the owners sustained a further loss of 50*l.*, as she could not complete the salvage ; and that it had been agreed between the two smacks that 50*l.* should be given to the *Minerva*, as being the first employed ; but that as the *Flora* singly

completed the service, this was a set-off, and the two smacks having shared equally, the *Minerva* was, by being run down, deprived of the benefit of the agreement."

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Jenner and *Pickard* objected to these articles of the libel. The protest is quite inadmissible; it is *res inter alios acta*: and there is no instance in which this Court has inquired into consequential damage.

Lushington and *Dodson* contra.—Unless the protest is allowed, we shall be entirely deprived of any evidence from the master and seamen of the foreign ship: we could not detain them for examination. The *Minerva*, at the time she was run down, had performed one day's service, and was in the act of earning the sum alleged, which has been called consequential damage, but which may be regarded as *quasi* freight.

JUDGMENT.

Lord *Stowell*.—This has been a very unfortunate adventure. The smack was performing a very useful service to a foreign vessel, and in the performance of that service was run down and destroyed. If the effect of that collision had been to destroy the persons on board the smack, it would be a reason for admitting evidence not strictly and technically legal; but none of the crew were lost; all survived, all are capable of being witnesses. A case of necessity then does not exist, such as might induce the Court to open a door for the admission of any evidence; and since it does not, I should be unwilling to allow a protest to be introduced that has been properly described as *res inter alios*

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acta : I therefore reject the protest, and the article that pleads it.

There is less weight in the second objection. No authority has been mentioned by which the Court might be induced to consider itself excluded from entertaining a question of consequential damages ; and I cannot persuade myself that the jurisdiction is so limited in this respect as the argument would suggest. Besides, this is not a mere claim for consequential and probable advantage only, for the smack was actually in the pursuit of earning that which it had been stipulated she should receive. I reject the third, but admit the fourth article of the libel.*

On 3d of *July* 1827, the Court, assisted by Trinity Masters, pronounced, that the owners of the *Betsey Caines* were entitled to be dismissed from the action.

May 15th,
1827.

* In the *Yorkshireman, Forman*, a case of collision, in which it was alleged that a fishing-smack was run foul of by the steam-boat while the smack was on a voyage from London to Norway to receive a cargo of lobsters, and that from her damage it became necessary to hire another smack for that purpose ; the Court (having condemned the owners of the *Yorkshireman* in the amount of repairs, and in costs), after argument, directed a reference to the registrar and merchants to report the amount of freight paid to the vessel substituted for the fishing-smack, in order that the same might be allowed as consequential damage.

AVISO. DA SILVA.

June 27th,
1826.

THIS ship, under *Brazilian* colours, and laden with four hundred slaves, was captured on the 26th of *September* 1824, by H. M. S. *Maidstone*, Capt. *Bullen*, in company with H. M. S. *Bann*, Capt. *Courtenay*, and was condemned at *Sierra Leone* under proceedings instituted by Capt. *Bullen*, in his own name only. Capt. *Courtenay*, being afterwards apprized that his ship was not named in the decree, and that it was Capt. *Bullen*'s intention to resist the claim of the *Bann* to share in the grant of bounty, memorialized the treasury; and he then was informed that the claim must be established in the Court of Admiralty. A monition was then issued against the commander, officers, and crew of the *Maidstone*, to show cause why the *Bann* should not be admitted a joint chaser and seizor; and in support of the claim an allegation was offered, pleading in substance: — “that, in *March* 1824, Capt. *Courtenay* being instructed by the Admiralty to put himself under Capt. *Bullen*, off the coast of *Africa*, for the purpose of preventing slave traffic, was on the 25th of *May* ordered by Capt. *Bullen* to place himself under his command; and on the 25th of *September* directed the *Bann* to keep company with the *Maidstone* during the night: that on the next morning at day-break a strange sail was discovered distant ten or twelve miles from the *Bann*, and, a signal being made by her to the *Maidstone*, both ships went in chase; but the *Maidstone*, being a superior sailer, passed the *Bann*, and about half past nine A. M. took possession of the

The principles of joint capture in prize cases apply to vessels associated in the capture of ships engaged in the slave-trade: therefore, where the actual capture was made by one of two vessels associated for such purpose, the other, which had joined in the chase and rendered subsequent assistance, held entitled to share in the bounty for the slaves and in the proceeds of the ship, stores, and cargo.

AVISO.

June 27th,
1826.

Aviso, the *Bann* being in sight and in chase, distant between two and three miles, and fast coming up: that Capt. *Courtenay* was then sent to the island of *St. Thomas*, and was thereby precluded from claiming as a joint seizor: that the two ships were associated and engaged in the same service: that the *Bann* was in chase, in sight, and fast coming up when the seizure was effected, and was therefore entitled to share in the proceeds and in the bounty-money payable for the slaves.”

Lushington and *Dodson* opposed the allegation.

The circumstances of the capture are not denied; but the principle applicable to war captures cannot operate in cases where there is neither intimidation nor encouragement; for what slave-ship can resist a frigate? The labour and trouble fall upon the actual captor; he alone is responsible to the owners if a seizure is wrongfully made. Constructive assistance is the foundation of the plea; and that cannot avail. Bounty under the 1 & 2 G. 4. c. 99. s. 6. * resembles as nearly as possible head-money, to which the actual captor is alone entitled.

Jenner and *Phillimore*, contra.—Captures whether in war or peace are not distinguishable as respects a question of this description: the *Bann* was associated with the *Maidstone*, and directed by Capt. *Bullen* to chase. Bounty-money for the capture of slaves has not been assimilated by the legislature to the principles on which head-money is granted; but it more resembles forfeiture under the revenue laws. The whole tenour and instructions of the order in council of the 14th of *October* 1816, which

* See 5 G. 4. c. 118. s. 68.

has frequent reference to joint capture, recognize the right of joint seizors and captors to share in the distribution of the bounty; and there is nothing to take the present case out of the general principles of intimidation and encouragement applicable to association.

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JUDGMENT.

Lord *Stowell*. — This is a case very properly brought before the Court for its judgment; for though somewhat like cases may have preceded it in point of fact, yet as none of them have been subjected to a decision, no principles have been established by any authority respecting the interest concerned. The interests in the present case are asserted to be those of a joint capture; and the circumstances under which they are stated to arise are the following: — H. M. S. the *Maidstone*, commanded by Capt. *Bullen*, was sent, under orders from the Admiralty, to cruise on the coast of *Africa*, but sent there for the express purpose of capturing all vessels carrying on the slave trade, in breach of the treaties subsisting between his majesty and foreign powers, and thereby subjecting themselves to *British* capture and confiscation. This was the great and peculiar object of Captain *Bullen's* mission. No other object of the mission appears in the orders on which he sailed; and he was on the station, and so employed, when the present transaction took place. In the early part of the year 1824, orders were given by the Admiralty to Capt. *Courtenay*, commander of H. M. S. *Bann*, to take his vessel to the coast of *Africa*, and there put himself under the command of Capt. *Bullen*. This, I think, cannot be considered as a mere general

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order, but must be deemed a special order, pointing to employment in suppression of the illegal slave trade; for that was the especial appointment of Capt. *Bullen*, who was appointed to that station for that specific purpose, and, as far as appears, for no other; and therefore, in all fair construction, H.M.S. *Bann* being ordered to that station, and being put under the orders of Capt. *Bullen*, must be deemed to be sent out to co-operate in the same purpose for which that officer was employed, that is, of capturing ships illegally concerned in carrying on the slave trade.

It appears that, in prosecuting this design, after having put himself under the orders and instructions of Capt. *Bullen*, Capt. *Courtenay* had examined a *Portuguese* ship, which was suspected of carrying on that trade, but which, at the time of the inquiry, had no slaves on board; he is afterwards sent off on a slave-capturing expedition by Capt. *Bullen* to examine the coast for that purpose, from *Cape Coast Roads* to the river *Cameron*, with orders to return and join, after examining the cruising ground off *St. Thomas*. This order was obeyed, and the *Bann* received a further order to join the *Maidstone*, which she did, and continued in company for the night, and at day-break she discovered a strange ship, nearer to herself than to the *Maidstone*, to which she gave chase, after making signal to the *Maidstone*, to announce what she had observed, and what she was then doing. The *Maidstone* immediately joined in the chase, and, by the powers of superior sailing, outstript her consort, and approached and captured the vessel or slave ship, containing four hundred slaves; the *Bann* soon after came up, and recognized her as

the very same vessel which she had examined a few days before, when she was empty of any cargo. The *Bann* then offered her services in any way in which she could be useful to the securing the vessel, and bringing her into port, and was actively employed in carrying the hawser, by which the captured vessel was to be towed into port; the *Maidstone* declined the acceptance of any further service, and carried the vessel to *Sierra Leone*, where she was proceeded against before the commissioners, in the name of the actual captor only, and by their authority adjudged to his vessel.

An application is now made to this Court, according to the act of parliament, on behalf of the *Bann*, as a joint captor of the vessel, and, as such, entitled to her proportion of the value of the ship, stores, and a proportion of the bounty money, likewise merchandize, if any.

Upon this statement of facts, it is impossible to describe a more complete continuity of association, short of actual capture, from the beginning to the end of this transaction. Without retracing all the preceding proofs of association betwixt these two vessels, I content myself with observing, that the *Bann* was the first discoverer of this vessel, and communicated the discovery to the *Maidstone*, and was only prevented by the superior sailing of that vessel from being the actual, and even sole, captor; that after the capture she gave assistance, and offered more. Under all these circumstances, is she entitled to be considered as a joint captor, with respect to the ship, and merchandize? I venture to say that I see no sufficient reason why this ship should not be admitted to a participation in the benefit arising from them, for she certainly

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would be so admitted upon the most temperate application of that law which the Court of Admiralty is in the habit of applying; and I must presume that the legislature, in conferring the jurisdiction on the Court of Admiralty, meant it should apply its own principles upon the cases submitted to it, or at least as far as it was proper to apply them. It did not mean that the Court of Admiralty should frame a system entirely new, and peculiar to this new subject, but should determine the cases submitted to it upon its own principles, with such accommodations as it might be proper to apply in cases, though not exactly the same, yet bearing much affinity to them. The persons acting in contravention to the treaties are to be considered as the enemies of the contracting parties, and their property confiscated as such by the captor, their persons only being left to such measures of vindictive justice as their respective countries may think fit to inflict. Here is an undoubted *animus capiendi*— here is a specific endeavour — and here is to be fairly added the increased terror of the enemy (for enemies, I repeat, they are to be considered, under the treaties,) produced by the apparent increase of hostile force.

A distinction is attempted with respect to the produce of the bounty-money. The latter, it is said, approaches nearer to the case of head-money, which has usually been treated as vesting in the actual captor alone, and not giving an interest to any who are not concerned in effecting the actual surrender; but that is bounty proceeding out of the public purse, vested in the captor by act of parliament, and has, therefore, received a very limited construction under the words of that act;

but this bounty is a representation of the property captured, being a reduced valuation of the slaves taken, the *res ipsa* of the property captured approaching much more closely to the nature of cargo. I think, therefore, that it is to be considered as liable to the same distribution. I will not say, that this ought to be carried possibly to the extreme length to which the principle of capture, by mere or accidental sight, has been carried in prize law, and which it has not been the policy of later times by any means to favour.

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If this case at all approached to a claim of that nature, I should not venture to give it a favourable reception; or, at least, I should not, without great and cautious deliberation, presume to transplant such a principle into this new subject. But this is a case of a very different kind: here is association and a high degree of co-operation throughout in an act belonging to that service to which these ships were specially appointed.

Upon these grounds, I am clearly of opinion that the claims of the *Bann* ought to be admitted. In the arguments, use has been made of the general revenue acts to justify this conclusion; but I shall be content to use those arguments without pressing them more particularly, because they belong to a different system less familiar to us in construction and administration, than that which we are in the habit of administering, and admit of an attention to some different considerations. The only act to which I shall think it necessary to allude to expressly, is the act of the 1st and 2d of His present Majesty, c. 99., which confers a jurisdiction on the Court of Admiralty, and which seems to have in view a case similar to the present, for one hardly

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can see any other subject upon which it could operate; since a case of actual and entire joint capture could not properly be a subject of any doubt, as the commissioners would naturally, themselves, pronounce in favour of both; and it could scarcely be in any other than such a case as this, not amounting absolutely to an actual joint capture, that a resort to the Court of Admiralty would be found necessary. I think, that, in conferring this jurisdiction upon the Court of Admiralty, it was intended to give that Court specially a jurisdiction of joint capture, leaving it to apply the principles of joint capture cautiously and temperately, and with such reserves in that application as a new subject would properly require.

Upon the whole, I admit the allegation to proof*: if proved, it will give the party an interest not only in the bounty, founded upon this moderate valuation of the slaves, but likewise in a proportion of

March 28th,
1827.

A vessel, which had chased a slave ship into a situation from which she could not escape, and then (being herself forced by a leak to abandon the chase) informed the capturing vessel thereof, held not entitled as a joint captor.

* In the *Orestes* a question arose on the capture of a Spanish brigantine, with 265 slaves on board, taken into the *Havannah* by Lieut. *Bennett* of H. M. S. *Speedwell*, where the Court of mixed Commission condemned the brigantine, and decreed the slaves to be emancipated. A motion having issued out of this Court against Lieut. *Bennett* to show cause why Lieut. *Lowe*, his officers and crew, should not be pronounced joint captors and seizers of the brigantine, and entitled to share in the bounty money for the slaves, his interest was denied; and it was then propounded in an allegation, of which the six first articles, in substance, pleaded:—That H. M. schooner *Union*, Lieut. *Lowe*, by an order from Vice-Admiral Sir *Lawrence Halsted*, commander in chief on the *Jamaica* station, placed herself under the directions of Capt. *Hobson*, of the *Ferret*, by whom he was instructed (on 17th *December*, 1825) to fall in with and put himself under the orders of H. M. schooner *Lion*, Lieut. *Smith*, employed in the suppression of

the ship, her stores, and every thing in her that constitutes her value. The allegation expressly,

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1826.

piracy and slave trading. The seventh pleaded:— That on the morning of the 26th of February, 1826, the *Union*, being thus associated with the *Lion*, and in company with her on a cruize off *Key Sal*, to the northward of the island of *Cuba*, the wind blowing from about N. E., chase was given to a strange sail, a brigantine under Spanish colours, to windward, which shortly afterwards made all sail towards the coast of *Cuba*; that the chase was continued during the whole of the day, but they lost sight of her at night. On the 27th they resumed the chase till past 8 p. m., when, owing to the night and the weather, they again lost sight. The 8th and 9th:— That, to intercept her passage to the *Havannah*, *Lowe* bore up for *Key Sal*, and at daylight on the 28th again discovered the brigantine, but the *Lion* was not then in sight; that the *Union* instantly recommenced the chase, and continued it during the day, and about 7 p. m. they entered the S. E. end of the gulph of *Providence*, when the chase was continued northward up the gulph close to the shoals along its western side; that about 9 a. m. on the following morning (1st of March), the *Union* having got off from a shoal on which she had struck, the brigantine being then out of sight, and from her situation, and the course she was steering on the preceding evening, there being no outlet to the westward, and it being impossible for her, as the wind then was (N. E.), to get away to the eastward without being captured by the *Union*, *Lowe* felt convinced that the brigantine had run ashore on a shoal on the western side of the gulph, called the *Grass Key*; that finding the *Union* leaky, and not knowing what damage she might have sustained, he proceeded to *Nassau* in *New Providence*, where she arrived at 3 p. m., when he immediately communicated to Lieut. *Bennett*, of the *Speedwell*, the whole of the circumstances attending the chase, and his belief that the brigantine was on the *Grass Key*. The 10th:— That on the morning of the 2d of March, Capt. *Hobson*, with the *Ferret*, arrived at *Nassau*, when *Lowe* communicated to him the same circumstances. 11th:— A letter from *Lowe* to *Hobson*, at the close of which was, “ I beg leave to say that it is my opinion the chase must have run ashore on the *Grass Key*.” 12th and 14th:— The official order of *Hobson* for the *Union* to sail in search of the *Lion*, to accompany her to *Jamaica*;

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and, in my opinion, justly, involves them all in the same claim, although the bounty-money has been almost the sole subject of discussion; upon all analogy, if good with respect to the bounty-money, it will, *a fortiori*, attach upon the other.

Note. This claim was not further opposed.

and that *Hobson*, having directed the *Speedwell* to go in search of the brigantine, in pursuance of their respective orders, the two schooners left *Nassau* on the 4th of *March*, and proceeded together down the gulph of *Providence*; that *Lieut. Bennett*, following the directions and information of *Lowe*, proceeded in the *Speedwell* to *Grass Key*, where he captured the brigantine.

Jenner and *Phillimore* opposed the allegation.

Lushington and *Dodson* contra.

June 19th.

Per CURIAM. — The claim of joint capture cannot be supported. I reject the allegation, but allow *Lieut. Lowe* his costs.

November 29th,
1826.

MINSTREL. ARKCOLL.

Where by the articles wages were not payable till the cargo was discharged (within a limited time), and where, after an arrest, the wages were paid within such time, the owners held liable to the costs of such arrest, they having refused to pay the mariner at the same time as the rest of the crew, but tendered him a less sum than was due

THIS was an application for costs.

The ship's articles stipulated, that no seaman should be entitled to his wages until the ship was discharged of her cargo, provided it were done within twenty days after her arrival at the port of delivery. On the 23d of *June* 1826, the vessel reached the port of *London*, and on the next day the crew were discharged, the cook being paid 1*l.* on account of his wages: on the 26th the rest of the crew were paid their wages. The cook twice applied for the balance due to him, viz. 17*l.* 2*s.* 6*d.* which was refused; the owners offering him 10*l.* "in full of his wages." This the cook declined "in full of his wages."

to accept; and on the 3d of *July* he caused the vessel to be arrested in a suit for wages. On the 11th, the discharge of the cargo was completed, and on the following day the balance of wages was paid to the cook's proctor, the question of the costs of the arrest being reserved.

Lushington for the owners. — The seaman's wages were paid agreeably to the articles: he was, therefore, not justified in his arrest of the vessel. *White v. Mattison** differs from the present case: the form of action distinguishes it: and the plaintiff there sued upon the undertaking of the defendant.

Jenner contra, was stopped by the Court.

Per CURIAM. — It appears on affidavit that the crew were generally discharged on the 24th of *June*, on which day this man was paid 1*l.* on account, and that on a subsequent day the owners, having paid in full the rest of the crew, offered to pay him 10*l.* "in full of his wages," but which he declined, and arrested the ship. These facts put the present case out of all doubt, and I allow the costs. †

MINSKAL.
November 29th,
1826.

* 2 *Starkie*, N. P. 325.

† In the *Thomas Handford, Sawyer*, the wages were paid after the arrest of the ship; but the owners denying their liability to defray the expences of the warrant and arrest, — inasmuch as the men had quitted the ship in direct disobedience to the master's orders, and that the wages were not due at the arrest of the ship, — gave bail to the action under protest: but the Court, after argument, over-ruled the protest, and allowed the seamen's expences, observing, that as the wages had been paid, the Court was entitled to assume that the justice of the demand was admitted.

December 13th,
1827.

The payment of wages after the arrest of the ship is an admission of the justice of the claim, and renders the owners liable to the expences of the warrant and arrest.

January 31st,
1827.

RAINER. LAING.

The Court of Admiralty cannot, in a case of salvage, allow charges for repairs.

THIS collier, bound from *Newcastle* to *London*, went on shore near *Wells*, on the coast of *Norfolk*. She was promptly assisted: the leaks were caulked, and ultimately the vessel and cargo were carried into *Wells*, where the necessary repairs for the completion of her voyage were effected. The salvors, considering that the owner, in the general settlement of the account at *Wells*, had failed to remunerate their services, and also to discharge a demand of 17*l.* to Mr. *Parker* for caulking and other temporary repairs previous to the removal of the vessel to *Wells* harbour, arrested the vessel and cargo in a cause of salvage.

On this day *Jenner*, for the salvors, submitted that this demand of 17*l.* should be allowed by the Court, inasmuch as the repairs, for which that sum was due, were so mixed up with the salvage, that they could not be separated, and ought to be recovered together.

Addams contra. — These services and demands were paid under the denomination of tide work. The Court has no authority to decree payment of a shipbuilder's account.

Per CURIAM. — The payment of this bill must be disposed of by other authorities.* This Court cannot decide upon the demand. For the salvage service I give 100*l.*, and costs.

* See Abbott on Shipping, p. 109. s. 11. (5th edit.)

ZEPHYR. ARROWSMITH.

February 17th,
1827.

THIS was a claim of salvage for services rendered by the *Rosalind* to the *Zephyr*, and asserted to have continued for seven days. Separate actions were entered on behalf of the master and crew, and also on behalf of the assignees of the late sole owner of the *Rosalind*; the assignees alleging that the whole of the insurances (9500*l.*) were forfeited by the deviation of the *Rosalind* from her course by assisting the *Zephyr*; and that, in consequence of such assistance, the *Rosalind* lost a month on her voyage, whereby certain losses and expences were occasioned to the bankrupt's estate.

Where vessels sail as consorts, and under an agreement to render mutual assistance, the Court will not entertain a claim of salvage for services rendered by one to the other.

In reply to these claims it was set forth in the act on petition, " that the *Zephyr*, of 290 tons and 18 men, sailed on the 29th of October, from *Honduras*, (with a cargo of mahogany, logwood, and other goods,) in company with the *Rosalind* and the *Sarah*; that it was agreed between the masters of these vessels that they should sail in company, in order to render mutual assistance, and protect each other against pirates, it being the usual custom of vessels in that trade so to do; that these vessels kept together till the 3d of *November*, when the *Sarah* parted company; that the *Zephyr* and *Rosalind* continued together, the *Rosalind* answering the signals which had been agreed upon, and following the *Zephyr* at night until the 8th, when the *Rosalind* being out of sight, the *Zephyr* wore to the S.E. in search of her, and after some hours joined her again, and they reached the straits of

ZEPHYR.
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1827.

Florida together on the 19th, when at midnight the *Zephyr* was run foul of "by an *American vessel*." The reply (after setting forth the damage to the *Zephyr*, and the services of the *Rosalind*, and that Capt. *Arrowsmith*, from the state of the *Zephyr*, thinking it advisable to proceed for port *Nassau*, and the wind being contrary to a passage through the straits of *Florida*, Capt. *Antrim* consented to follow the *Zephyr* through the north-east *Providence Channel*, and in that direction into the *Atlantic* by the *Hole-in-the-Wall*, and that the vessels continued in company until the 23d, when being within a few miles to the northward of the *Bury Island*, and the wind coming more from the eastward, Capt. *Antrim* altered his course, and proceeded as at first determined through the straits,) alleged, "that the service rendered in lying by for a few hours, and lending a few men for a short time on two days, was not a salvage service, but such as every ship's master and company ought to render to any other ship sailing in company; and further, that the *Rosalind* did not deviate from her course, and that a forfeiture of the insurance had not been incurred."

The agreement and usage were denied: and it was alleged "that the *Rosalind* quitted the *Zephyr* solely because both captains considered the *Zephyr* in safety; that Capt. *Arrowsmith* had admitted the great services of the *Rosalind*, and declared that if the present action had not been commenced, he would himself have compensated Capt. *Antrim*, and accompanied him to the consignees of the cargo to procure him remuneration."

The usage for vessels in the *Honduras* trade to sail for *England*, under an agreement to render

mutual assistance in case of necessity, as well as for protection against piracies, was deposed to in the affidavits of Capt. *Arrowsmith*, of the chief mate, and others of the crew of the *Zephyr*, and also by a master-mariner, who had been constantly employed in the trade for five years ; and who further stated, " that in general the homeward passage was by the straits of *Florida*, but that the course varied, according as the wind and other circumstances might direct ; and that at the fall of the year he should have chosen the north-east *Providence Channel* in the event of finding little current in the gulph." And two underwriters also deposed, " that the choice of a passage was discretionary with the master of the vessel insured ; and that they should not consider an insurance forfeited were a vessel to pursue one course rather than another." The *Zephyr* was sold at *Nassau* for 500*l.* ; and her cargo, there estimated at 3500*l.* sterling, was freighted on to this country. Some silver bullion, of the value of 1000*l.* consigned to *London*, was brought home in the *Rosalind*, to which vessel it was transhipped when she quitted the *Zephyr*.

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Lushington for the salvors. The agreement is vague and general ; it was of no binding effect, for the *Sarah* sailed away. The strong fact is the admission of Capt. *Arrowsmith*, that if the action had not been entered, he would have exerted himself to have obtained a remuneration for the *Rosalind*.

Jenner for the assignees.

Arnold and *Dodson* for the *Zephyr*. We do not deny that the assistance was advantageous to the *Zephyr*, and that it may have been prejudicial to the *Rosalind* ; but the latter was bound under the

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agreement of companionship to render it. The deviation of the *Rosalind* was not such as to incur a forfeiture of the insurance.

Phillimore for the consignee of the bullion.

JUDGMENT.

Lord *Stowell*. — These vessels sailed not only as consorts, but as consorts under a special agreement to give mutual protection. The contract was made as a security against a common danger: and it was possible that such a contract, which promised benefit to all the parties concerned, might prove injurious to one; but they took it for better for worse. The results might be various: it might happen that neither vessel would sustain any misfortune, nor require any assistance; or it might happen that one might fall into misfortune, and be entitled to aid from the other vessels with which she was associated. Of such an agreement each ship enjoys the benefit; for the one that renders assistance has the assurance, that if any calamity should happen to her she would reap the benefit of the mutual stipulation. It turns out, but that is quite a matter of accident, that the *Zephyr* is the vessel that requires assistance, and she enjoys the security and receives the benefit to which she was fully entitled by the contract.

I am informed by the gentlemen of the Trinity-House, whose attention has been occupied upon this case, and who are well experienced in contracts of the nature in question, that it is agreeable to well-established usage for vessels in the *Honduras* trade to sail together on understandings of this sort, and that such agreements are sup-

ported by general convenience and benefit. The gentlemen perfectly concur with the Court, that the delay occasioned to the *Rosalind* by accompanying the *Zephyr* after her accident (even putting the agreement out of consideration), is not sufficient to maintain a demand for salvage. The assistance clearly does not continue beyond the fourth day, for on the 23d of November the *Rosalind* resumes her original course. Nor does it appear that the deviation would vitiate the insurance: the homeward course from *Honduras*, as far as respects the policy of insurance, is left optional, and the propriety of adopting one passage or the other depends upon the state of the wind, and other circumstances.

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1827.

That the master of the *Zephyr* made use of the expression — that if the *Rosalind* had not entered an action of salvage, he would have done his utmost to have obtained from his owners a remuneration for her services — cannot be carried further in this case than a hope that the *Rosalind* would receive an honorary acknowledgment for her prompt attention.

As to the two boxes of unstamped bullion, the freight upon this part of the cargo has been received: it was paid at *Honduras* before the *Zephyr* sailed; and, after her accident, the boxes were removed for the greater advantage of time, in order to secure an earlier arrival in this country. I shall certainly dismiss this claim: and the only difficulty is the question of costs. A great deal more has been done in this suit than was necessary, and the Court is always anxious to discountenance experiments; but considering that the owner of the

ZARFA.
February 17th,
1827.

Rosalind is a bankrupt, I shall not accompany this sentence with costs.*

March 5th,
1828.
Quere. — Whether if a custom to render mutual assistance be established, it would exclude a claim for salvage.

* In the *Margaret, Kay*, — in which a claim of salvage (for assistance rendered in *Davis' Straits* by one whaling ship to another, both vessels belonging to the same owner) was opposed partly on the plea, "that it was an invariable and immemorial custom in the *Greenland* fishing service for the masters and crews of vessels engaged therein mutually to render assistance to each other without remuneration," — the Court (Sir *Christopher Robinson*) observed: I forbear to advert to the custom that has been set up, as the evidence is not specific on that point, either on side or on the other. I am, therefore, disposed to leave that matter untouched, and without prejudice to future cases. I shall decide this case on the ground, — that no service was rendered, and consequently no salvage is due. The Court will be cautious not to encourage vague pretensions in a trade of this kind. I dismiss the demand. (a)

Lushington and *Salisbury* for the salvors.
The *King's Advocate* and *Nicholl* contra.

(a) See the *Waterloo*, Birch. 2 Dod. 436.

February 27th,
1827.

ATLAS. CLARK.

The Court of Admiralty has an undoubted jurisdiction over bottomry bonds, which are founded upon sea risks and defensible by the destruction of the ship in the course of her voyage; but the

THIS was a case of bottomry promoted by *Fletcher, Alexander & Co.*, agents of Messrs. *Alexander & Co.* of *Calcutta*, the holders of a bottomry bond, against *James Inglis* and *Robert Spankie*, the executors of the will of *Patrick Chalmers* deceased, whilst living the sole owner of the *Atlas*.

The bond was of the tenor following: —

Know all men by these presents, that I *William Clifton*, now residing in *Calcutta*, master of the ship *Atlas*, of the burthen of 411 tons, am held and firmly bound unto *James Young, Thomas Bracken* [and others] of *Calcutta*, merchants, carrying on business together under the firm of Messrs. *Alexander & Co.*, in the penal sum of *Sicca* rupees 132,000 of lawful money of *Bengal*, for the payment of which well and truly to be made unto the said *James Young, &c.*, their attornies, heirs, &c., I hereby bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal. Dated this 12th of *March, 1824*.

Whereas the said ship *Atlas*, bound on a voyage from the port of *London* in *Great Britain* to *Calcutta*, and from thence home to the port of *London*, lately arrived in the River *Hoogley* on her said voyage, and was there wrecked and sunk, and received great damage, and at a considerable expence was raised and recovered; and whereas the said *William Clifton* being such master and commander of the said ship, now lying in *Vrignon's* dock, has been unable to raise and procure on the security of the said ship, or otherwise, sufficient sums of money fully to repair the said vessel so as to enable her immediately to proceed in the completion of her voyage to *London*. And whereas for the preservation of the vessel, and to enable her ultimately to proceed on her said voyage, and to complete the same, considerable and immediate repairs were absolutely necessary to be done to the ship, before sufficient funds can be obtained to complete her repairs and refit the ship. And whereas the said *William Clifton* hath taken up and

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Court — inclining that a bond, absolute and without dependence on the accidents of the voyage, was not subject to its cognizance, — dismissed a suit on such bond; the more willingly as questions of mercantile practice were involved more fit to be decided by a reference to merchants.

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received of the said firm of *Alexander & Co.* the full and just sum of *Sicca* rupees 66,000 of lawful money of *Bengal*, for the purpose of such necessary and immediate repairs, and other charges and expences necessary for the said ship, and of enabling her ultimately to complete her voyage, which sum is to run at *respondentia* on the block and homeward freight of the said ship from the port of *Calcutta* on her return voyage to the port of *London*, or other port in *Great Britain*, at the rate of premium of twelve *per cent.* for the said voyage; and for the better security of the said *James Young, &c.*, the said *William Clifton* hath agreed to mortgage and assign, and doth by these presents mortgage and assign over to the said *James Young, &c.*, their heirs, executors, administrators, and assigns, the said ship *Atlas* and her freight for the said homeward voyage, together with all her tackle, apparel, and so forth. And it is hereby declared and agreed, that the said ship, and her freight as aforesaid, is thus assigned over for the security of the monies aforesaid, taken up by the said *William Clifton* to run at *respondentia* as aforesaid, and shall be delivered to no other purpose or use whatsoever until payment and satisfaction of this bond be first made, with the premium that may become due thereon. Provided always, that nothing herein contained shall be construed to destroy or in any manner affect any lien upon the said ship to which the said *James Young, &c.* may be entitled for the money so lent and advanced by them as aforesaid: and whereas the said *William Clifton* has undertaken to the said *James Young, &c.*, that the said ship shall with all reasonable speed be fully and ade-

quately repaired for the completion of her said voyage; and being so repaired, shall, within 15 months from the date of these presents, set sail and depart from *Calcutta* upon and for the completion of her said voyage to the port of *London*, and, barring the perils and accidents of the sea, shall duly complete her said voyage. Now the condition of this obligation is such, that if the said ship, being fully repaired for the completion of her said intended voyage, shall, within 15 months from the date of these presents, set sail and depart from *Calcutta* upon and for the completion of her voyage to *London*, and, barring the perils and accidents of the sea, shall duly complete her said voyage, and if the above-named *William Clifton* shall and do well and truly pay or cause to be paid unto the said *James Young, &c.*, or their attornies legally authorized to receive the same, or to their executors, administrators, or assigns, the full sum of *Sicca* rupees 66,000, being the principal of this bond, together with the premium which shall become due thereon at the rate of twelve *per cent.* as aforesaid, at or before the expiration of thirty days after the safe arrival of the said ship in the river *Thames*, or other port in *Great Britain*; or in case of the loss of the ship *Atlas*, then within thirty days next after the account of such loss shall have been received in *Calcutta* or *London*, then this obligation to be void and of no effect, otherwise to remain in full force.

Signed, sealed, and delivered in the presence of
J. Thuoult. *William Clifton, (L.S.)*

Memorandum, 7th July, 1824.

By our agreement with Capt. *Clifton* dated 12th March, 1824, it was settled that should we

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have to close our account with him for the ship *Atlas* and stores, with a view to her dispatch to *Europe*, we should write off on the back of this the sum which the said balance of our account might want to complete the sum of 66,000 *Sicca* rupees, the said balance is on this day *Sicca* rupees 52,898 14. We therefore hereby acknowledge and agree, that this principal amount only, increased by premium twelve *per cent.*, will be claimable on this bond.

James Young (L.S.) *Thomas Bracken* (L.S.)

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 Trinity Term.

The cause came on upon petition and affidavits; when the Court delivered the following observations: —

Per CURIAM. — Before we pursue the subject of this case any further, I think it fit to interpose a few words respecting an impression on my mind which I think it necessary to be removed before I proceed in this discussion; it is founded upon an objection *in limine*, to the entertainment of this suit, and which appears to me very formidable, if not fatal; and that is, that the bond upon which this suit is founded is not of that species of which this Court holds cognizance. This Court has certainly an established jurisdiction over bottomry bonds, properly so called; such bonds are founded upon sea risk, and are defeasible by the destruction of the ship in the course of her voyage, on which account alone the high interest is allowed, and is supported by the established course of this Maritime Jurisdiction; but this bond is not defeasible by any such casualty: whether the ship sinks or swims, whether she arrives at her destined port or is lost in the ocean, it makes no real difference in the bond; for the debt with the accompanying

interest continues in full force, and is only slightly affected as to the time of payment by the event of a total loss : the hypothecation goes no further, and would not go so far if not compelled by the necessity of the later intelligence, which must be received after the actual loss of a ship. The bond is absolute without any dependence whatever upon the accidents of the voyage ; the debt and the interest thereon must, under any event whatever, be discharged. I therefore entertain a very serious doubt whether, in proceeding upon such a bond, I might not subject this Court to the hazard of prohibition.

The definition of bottomry bonds which I find in all the writers that have adverted to the subject, are contracts in the nature of mortgages of a ship on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and pledges the keel or bottom of the ship, *pars pro toto*, as a security for repayment. It is moreover stipulated, that if the ship is lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money ; but if the ship shall arrive safe, then he shall be paid back his principal, and also the interest agreed upon, called marine interest, however this may exceed the legal rate of interest.

In the *Roman* law, which treats largely of these contracts, it is called *fœnus nauticum*, or *usura maritima*, and the high interest which is permitted, and which is to reimburse the lender (who in all cases, and not the borrower, is to run the risk), is therein denominated *periculi pretium*, or the price of the hazard which the lender incurs : such is a bottomry bond, but this bond contains no such engagement ;

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In bottomry bonds, which are contracts in the nature of mortgages, the lender runs the risk of the loss of the vessel ; and in case of her safe arrival receives large interest, called maritime interest, *fœnus nauticum, usura maritima, pretium periculi.*

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on the contrary, the borrower runs all risks and answers all misfortunes.

The allowance of twelve *per cent.*, which in this bond is permitted to be exacted in all cases, whether of a successful or an unfortunate voyage, is not a *periculi pretium*, for danger there is none. The bond, then, being the foundation of the suit is the first object of attention; and it would be imprudent to proceed further upon it till this doubt is clearly removed.

On a subsequent day, the Court further remarked:—

Per CURIAM.—When this case was first presented to my view, it seemed to me that it lay rather beyond the jurisdiction of this Court, as that jurisdiction is usually exercised on such subjects. This Court exercises an undisturbed jurisdiction over hypothecation bonds, and it appears that this bond is so denominated in the *East Indies*; but it being so denominated there, will not make it such, in the view of this Court, if it does not pledge the vessel herself for the sole payment of the bond. Here the bond is absolute. In any event that happens to the ship, the money must be paid. It is, therefore, an absolute and indefeasible bond— not an hypothecation bond, at least in the sense which this Court applies to that term.

I believe it may be true that some bonds, not exactly conformable to this rule, may have passed by unobserved by the Court, in cases where the parties have both of them come willingly before the Court, and have not drawn its attention to the phraseology of the bond; some such may have passed

without observation. I have no reason to think this has happened frequently; but I believe the fact to be, that these bonds are often inaccurately expressed — expressed differently in the style of different countries — but tending to the same point, viz. the dependence of payment upon the safety of the ship. The mercantile capital of *England* is so universally diffused over the whole globe, and *English* credit is so well established in foreign ports, that occasions, perhaps, more seldom occur, and a less necessity exists for a recourse to such bonds in *English* use, than in the commercial transactions of other nations. But such necessities do occasionally exist; and where they do, this practice, coeval with the *Roman* law, is applied. The existence of such bonds is fully supported by the authority of Maritime Courts, in every part of the commercial world, as well as of this.

If it be said that the ship is the first pledge in this bond, and, therefore, upon that principle, if it can be so called, the jurisdiction ought to act, I think that is not a principle which will support these bonds. This Court, except upon the subject of prize, exercises an original jurisdiction upon the grounds of authorised usage and established authority. The history of the laws of this country shows full well that such authorised usage and established authority are the only supports to which this Court can trust, except in respect to the subject to which I have alluded.

I feel another strong objection to proceeding further in this case; supposing the question of jurisdiction got over. The transactions are entirely of a mercantile nature — but of a mercantile nature that is almost entirely oriental; the whole

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The Court of Admiralty, except upon the subject of prize, exercises an original jurisdiction only on the grounds of authorized usage and established authority.

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demand, from the original outset, commences, and, I had almost said, terminates there. Of such transactions I am a very insufficient judge. What expences were proper to be incurred there — what enterprises to be undertaken — what allowances to be properly made.

It has been intimated, that no other Court possesses a jurisdiction that would grant a relief to the complaining party. Taking that to be the fact, it would not supply this Court with authority to proceed; for this Court is not a general receiver, nor is it empowered to entertain derelict jurisdictions. The proper result of such defect would be — what I am strongly inclined to recommend — a recourse to a reference to merchants acquainted with the modes of conducting oriental adventures; for, as far as I can judge, such knowledge is essentially necessary to a right decision of this case.

The propriety of many of the measures in *India* is arraigned; this, it is said, ought to have been done — that ought not to have been done. The propriety of conduct, therefore, in such affairs, is much more proper for mercantile decision, than for one that is merely judicial. I strongly advise the parties to accede to this recommendation, being confident that they would receive much more expeditious and satisfactory justice therein, than could be expected from a Court which, omitting all other objections to it, would, from the mere doubtfulness of its jurisdiction, be liable to expensive interruptions.

The cause then stood over for further inquiry and consideration, after which the Court proceeded to deliver its final decision.

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Lord *Stowell*.—I have reconsidered this question, and I have to communicate the final result of my considerations upon it. It certainly appears to me to be a case which the powers of this Court do not enable me to conduct to any satisfactory result either of jurisdiction or of merits, being very unsettled in the first of these qualifications, and very much out of the reach of legal inquiry in the latter. With respect to the first matter, that of jurisdiction, it, at the very first outset, occurred to me, as open to a very important doubt, whether the contract was of that nature which is subject to the established cognizance of this Court. The bond is executed in the *East Indies*, and calls itself an hypothecation or bottomry bond, but it is certainly of a very different nature from bonds which are so estimated and denominated in the proceedings of this Court. Having already described the distinctions between them, I shall shortly repeat the description of those distinctions. The hypothecation or bottomry bond known to the civil law, and acted upon with an undoubted authority by this Court, is a bond whereby the captain of a vessel, not having any credit in the port, is enabled to obtain money for the repair of the ship, and its equipment for the voyage, upon what is called maritime interest. In the *Roman law*, in which it was familiarly known, it was called *usura maritima*, or *fenus nauticum*. The extent or value of this security for repayment was not limited, for it was not certain, but only eventual, dependent upon the safe accomplishment of the intended voyage. If the ship arrived safe, the title to repayment became vested; but if the ship perished *in itinere*, the loss fell entirely upon

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the lender. Upon that account, the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions. It partook of the nature of a wager, and therefore was not limited to the ordinary interest; the danger lay not upon the borrower, as in ordinary cases, but upon the lender, who was therefore entitled to charge his *pretium periculi*, his valuation of the danger to which he was exposed. A contract similar to this, upon the cargo of the ship, is called a *respondentia*, but is of rarer occurrence.

Such hypothecation bonds upon the ship are frequent in this Court, though, from the diffusion of *British* capital and credit over every part of the navigable globe, less frequent in *British* use, in consequence of less frequent necessity, than in the Courts of other maritime nations. But the contract, which is the subject of the present contest, is of a very different nature; it is independent of all contingency. The interest is to be paid whether the ship arrives or not: not only the ship, but the whole property of the party, is equally pledged, that upon land as well as that upon sea; and it is pledged, not for the payment of a *fœnus nauticum*, but for an interest not uncommonly given in common transactions in that country. Payment in the different events is expressed in one and the same sentence, whether the ship sinks or swims, with a mere difference in point of time of payment, arising from absolute necessity; and the ship, in either case, is not more pledged than the whole property of the individual, whether upon land or sea, and independent of any casualty. It happens, however, in the practice of that quarter of the world, to be called an hypothecation bond, but no instance has occurred

of that denomination in the practice of this Court during my long attendance in it, excepting one, the *London*,* in which I was concerned as counsel, but which cannot certainly be in any manner considered decisive in the matter of jurisdiction. But Sir *James Marriott*, my predecessor, did not, as far as any recollection of mine, or as far as any existing notes apply, enter very particularly into the question of jurisdiction; he contented himself with declaring, that, upon the whole, he was inclined to support the bond, being to be executed upon the sea; and that if he was not prohibited, he would not prohibit himself.

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The proceedings went on under the jurisdiction of this Court, no prohibition being moved for. After the execution of the sentence given by the Admiralty, the matter came under the consideration of the judges of the Court of King's Bench, in the case entitled *Ladbroke v. Crickitt*. † That was an action of trover for the ship *London*, in which a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on a case, stating that the vessel was taken in execution on the 4th of *May* 1787 by the plaintiff, as sheriff of *Surrey*; and on the 24th of *May* another writ was executed on the vessel by the plaintiff. On the 5th of *July* the plaintiff was served with a notice from the defendant, that he, the defendant, as marshal of the Court of Admiralty, was in possession of the vessel by a writ under seal of that Court, at the suit of *Atherley* and

* The *London*, PASMORE. July 16. 1787.

† 2 T. R. 649.

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others, for a bottomry bond. The judgments under which the plaintiff levied execution were of *Easter Term 1787*. On the 8th of *November 1786*, *George Pasmore* had executed an instrument under seal at *Cowes*, reciting "that he was master and owner, and that the vessel, in the course of her voyage from *South Carolina* to *London*, had sustained great damage, insomuch that he was under a necessity, for the safety and preservation of the vessel, to put into *Cowes* to repair," and reciting, "that the agents of *Atherley*, and the others in that suit, had expended, in the repairs, 824*l.* 8*s.* 5*d.*, for the due payment whereof, he, *Pasmore*, agreed that the said vessel, her tackle, &c. should be and remain as security, by way of bottomry." It was further stated, "that he should immediately sail with the said vessel for *London*, and would pay the bottomry bill on the 8th of *May, 1787*, either at the port of *London*, [or at any other port whereat the said vessel should happen to arrive ;] and he thereby bound his executors, &c. and also the said vessel, in 1648*l.* 16*s.* 10*d.* for payment of the sum due and further not to depart with the vessel from *London*, [or permit her to sail from thence after her arrival there,] till the money should be paid." *

Atherley and others instituted a suit in the Admiralty Court on this instrument, and on the 1st of *January, 1787*, a warrant issued upon such proceeding from the Admiralty Court, empowering the defendant, as marshal, to arrest the vessel, and to

* The passages within brackets are inserted from the original bond.

cite all those who had any interest therein to answer to *Atherley*, and the rest, in a cause of bottomry, civil and maritime. On the 1st of *January*, 1787, the defendant arrested the vessel in the River *Thames*, and cited all the parties, &c., and was in possession when the plaintiff's executions issued. The case then stated, that on the 16th of *July*, 1787, the Admiralty decreed the ship to be delivered to *Atherley* and the rest ; and on the 22d of *November*, 1787, a warrant issued to the defendant, as marshal, to sell the ship, (which warrant, it is to be observed, only stated, that proceedings had been had in a certain cause of bottomry, civil and maritime, between the parties, in which the Court had awarded possession, without stating the grounds of the suit.) By virtue of this warrant, the defendant sold the ship for 980*l.* which was regularly certified to the Admiralty Court.

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When the case was in the Court of King's Bench, it was contended for the plaintiff, first, that the instrument given to *Atherley* was not a bottomry bond ; and secondly, even if it were, that the Court of Admiralty had no jurisdiction over the subject-matter. But all the judges waived the discussion of the subject of jurisdiction, and contented themselves with deciding the question on the imbecility of the plaintiff's title, declaring that, if he was not entitled to recover, it was immaterial to consider whether the Court of Admiralty had any jurisdiction : and it will appear to any person who reads that report, that the immediate question of jurisdiction received no decision either one way or the other.

It is not within my recollection that any such case has occurred since, at least, none in which the

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objection was presented to the Court or observed by the Court itself, and the question remains in the same undecided state as it was left by the judges of the Court of King's Bench in the foregoing case. Having this authority, which does not decide the question, I had promised myself great satisfaction of my doubts from opinions of two very eminent professors of common law, for whose legal talents I entertain the highest respect ; but it appears to me, that they have not exactly understood the difficulties under which I laboured, and have, therefore, failed in removing them ; they have most effectually proved the difficulties with which the case would have to struggle within a Court of common law. Granting all this, I am by no means satisfied that, therefore, the Courts of civil law possess a jurisdiction. They may labour under an equal incompetency, though of a different kind. The civil law Courts have no right to usurp an authority, merely because a common law Court does not possess it ; it must have a more direct and positive foundation. A Court of civil law does not claim to be the refuge for all destitute jurisdictions.

It is said that a Court of common law would not grant a prohibition : but I have never understood that the grant of a prohibition by the Court, having a prohibitory authority, was mere matter of inclination and will, to be granted or withheld at pleasure ; or that it was at all necessary, in order to justify the grant of a prohibition, that the Court to which the prohibition was issued, was guilty of any direct invasion of a jurisdiction belonging to the Court which prohibits. I should presume, that whenever a Court usurps a jurisdiction that does not belong to it, a prohibition is grantable

ex debito justitiæ, and for the very purpose of correcting such an usurpation, and preserving the subject Courts within their proper limits.

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It may be said, that as the parties in this case have both consented to the jurisdiction of the Admiralty, the case might have proceeded safely to a sentence, without fear of a prohibition, and that no prohibition could be afterwards granted; and this brings me to a second point to be considered—the merits of this case. Now these merits are very considerable in point of magnitude, and very involved in point of transaction; they comprise an interest of several thousand pounds, and they go through a course of transactions extremely complicated in themselves, and turning upon questions not of law, but of mercantile practice, and mercantile prudence, considered upon oriental views and usage, very different from the case I have cited, which lay within the compass of a single 1000*l.*, and involved no question at all that could be agitated upon the facts. I confess it appeared to me, when I first discovered that it was a question of such extent of interest, and turning upon transactions of a nature so unfamiliar to legal consideration, that it was quite unfit that I should engage myself therein, without its being first ascertained that, in so doing I should be only discharging a duty, and not committing a trespass. I am not insensible to the wishes of the parties, but they very well know that the consent of parties cannot create a jurisdiction where it does not exist.

Under the influence of these considerations, I had strongly recommended to the parties a reference to merchants, gentlemen well acquainted not only with the conduct of trade generally, but with

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the particular usage and practice of oriental commerce; and such gentlemen may easily be found within the compass of the city. This proposal was rejected by one of the parties, upon the ground of the expences already incurred in litigation: upon which I have only to observe, first, that I expressed my doubts and difficulties, respecting the jurisdiction, the very first time that the bond was subjected to my notice; and secondly, that after the future litigation which is to be incurred, still a reference to merchants must unavoidably be resorted to. A Court of common law might have the useful assistance of merchants forming a jury for that very purpose; but this Court can have no such assistance, and I must take upon myself to decide upon all the merits, without any assistance but such as the counsel can afford me; and after these general merits are settled here, in a way which I cannot contemplate without some apprehension, I must then consign the extent of all particular claims to an examination by merchants. I very much doubt whether, looking at such a course of proceedings, and to the probability of future appeals, I am entitled to consider it either more economical, or more just, than the immediate reference which I had recommended. However, in the situation in which I find myself, I think the fairest method of relieving myself, under those difficulties, will be to dismiss the suit on account of the doubts I entertain respecting jurisdiction. The party affected by that sentence may appeal to the Court of Delegates for a decisive solution of those doubts. If they determine in favour of the jurisdiction, they may either retain the cause with much ampler powers than I possess of reaching its real justice,

or may remit it to me to pursue it, free from the dangers of committing an usurpation, unless the parties should be convinced, by the intimations I have thrown out, of what, in every just view of the matter, it were advisable to adopt.

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From this sentence an appeal was prosecuted to the Delegates *, where the cause was argued — for the Appellants, by the Solicitor General (Sir *N. C. Tindal*), *Lushington* and *Dodson*, LL.D. — for the Respondents, by *Jenner* and *Phillimore*, LL.D. and *James Parke*.

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For the Respondents. — The instrument in question is not a bottomry bond; it is an absolute mortgage of the vessel, with an illegal interest. We admit that bottomry bonds are drawn in different forms in different countries; but they must be subject to a contingency. Marine risk is of the nature and essence of these bonds; the principles applicable to them are founded on the civil law; and all authorities, text writers, and precedents, from which the marine law can be drawn, show that maritime risk is indispensable in bottomry bonds, and that they are classed among contracts in which both principal and interest must be at hazard. Dig. lib. 22. tit. 2. Cod. lib. 4. tit. 33. *Bynkershoek Quæst. Jur. Pri.* lib. 3. c. 16. pp. 506. 509. *Pothier, Traité du Contrat d'Assurance*, and *De Prêt à la grosse Aventure*, vol. 3. c. 1. s. 2. and p. 77. *et seq.* (Ed. Paris, 1781.) *Benicke on In-*

Quære. — Whether a bond professing to be a bottomry bond, but excluding maritime risk, is subject to the Admiralty jurisdiction. The Court directed a search for precedents.

Five precedents of such bonds but no judicial decisions on the point being found, the Court, after directing an argument, decided that the interest reserved was maritime interest, and that therefore, *ex concessis*, the bond excluding sea risk was void.

* The Judges were: — *Hullock B.*, *Gaselee J.*, *Littledale J.*, *Arnold*, *Daubeny*, *Gostling*, *Blake*, *Haggard*, and *Salisbury*, LL.D.

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urance, p. 72. *et seq.* *Abbott on Shipping*, p. 487. *et seq.* (5th ed.) *Magens on Insurance*, vol. 2. pp. 53. 56. 393. *Glover v. Black*, 3 Burr. 1394. *Menetone v. Gibbons*, 3 T. R. 269. *The Jane*, 1 Dod. 461. *Hero*, 2 Dod. 139. *The Nelson, Brown*, 1 Haggard, 177.

As far therefore as any forms and precedents exist, or any intimation can be drawn from the cases at common law and in the Admiralty Court, bottomry bonds are invariably subject to the contingency of marine risk. The only instance of a contrary tendency is in *Ladbroke v. Crickitt*, 2 T. R. 649; but in that case the Court of King's Bench expressly declined to give an opinion upon the subject of the Admiralty jurisdiction, there appearing nothing upon the face of the decree repugnant to its authority. Whether the bond-holders are with or without a remedy elsewhere is not for the consideration of this Court; because parties may make a contract upon which no remedy could be founded either in a court of law or equity, or in the Court of Admiralty.

For the Appellants.—The grounds upon which Lord *Stowell* dismissed this suit were, first, his doubts whether the Court had jurisdiction: secondly, his doubts whether he could do substantial justice between the parties in so complicated a case. So that the question of jurisdiction may fairly be considered as open to the fullest and most free consideration of the Court of Appeal.

The Appellants contend, first, that taking all the recitals and the whole of the condition of the bond together, there is a sea risk necessarily to be inferred from the obvious intention of the parties, that intention is to be inferred from the bond.

Secondly, that even if there is no sea risk upon the face of the instrument, but that it becomes a simple case of hypothecation of a ship by the master in a foreign port for the necessary purposes of the ship, still the Court of Admiralty has jurisdiction.

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The intention of a written contract is to be collected from the whole and not from insulated parts. In *Thorpe v. Thorpe*, 1 Lord Raym. 235. it was ruled, that the general words in a release should be qualified by the particular words in the recital. A similar rule of construction was laid down in *Butcher v. Butcher*, 1 New Rep. 114. But this rule of construction is too obvious to require any authority. The whole of the condition of this bond must be looked at in order to discover the intention. The intention of the Captain to borrow upon bottomry is manifest. He recites expressly his inability to borrow a sufficient sum fully to repair the ship, either on the security of the said ship or otherwise: he then recites that he had taken up a sum which was to run on *respondentia*, on the block and homeward freight of the ship *Atlas*, at the rate of twelve *per cent.* for the voyage. There is therefore nothing in these recitals but a manifest object to make a bottomry contract. The evidence shows that it was in the contemplation of all parties that the contract should be a regular bottomry bond. The term *respondentia* is used generally and perhaps indiscriminately for money lent, whether on the cargo or on the ship; but the circumstances of this case prove that it was a bottomry transaction. Application had been made to all the principal houses in *Calcutta* for money on bottomry; and was it to be supposed that *Alexander & Co.* would advance it on less security? They were not the agents or

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correspondents of the owners of the ship : the ship was consigned to them without their previous knowledge ; and no provision had been made for extraordinary advances. Capt. *Clifton* supposes, that the agreement, from the commencement, was for the advance of money on bottomry ; and the bond is insured. The only difficulty arises upon the words in the instrument, “*or in case of the loss of the said ship Atlas, then within thirty days after the account of such loss shall have been received in Calcutta or London.*” But this clause is so manifestly inconsistent with the preceding conditions, and in contradiction of the declared object of the bond, that the words may be regarded as senseless, as the insertion of an ignorant scribe, and repugnant to the rest of the conditions. The clause ought therefore to be rejected.

Hullock B. — Can the Court strike out the clause, and amend the bond ?

Argument resumed. — By the law of *England*, instruments are to be construed according to their general intent ; and bonds of this description are not considered strictly. In the *Nelson*, that has been cited, and in the *Tartar*, 1 Hagg. A. R. 13., the bonds were held valid as to that part which was good, the Court, in each case, rejecting the clause affecting to bind the owner : and, in point of principle, one clause may be rejected as well as another.

Hullock B. — In those instances the bonds were generally good : here this condition destroys the whole instrument.

Argument resumed. — In the *Augusta*, 1 Dod. 283. the Court held that it was not necessary a bond should be either good or bad *in toto* ; a principle

which has been recognised in subsequent cases. If this ship had been lost, then this condition of the bond would have come in question ; but the ship is safe, and it is only the good part of the bond which is before the Court. Any construction should be had recourse to rather than that the bond should be held void.

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But *2dly*. If there be no sea risk, still it is a good bottomry bond. The quotations from the *Roman law* do not apply ; and the passages from *Bynkershoek* are strictly confined to what is the law of *Holland*. In *Abbott's Treatise on Shipping*, this subject is touched too slightly to amount to a decisive authority. That learned writer says (p. 117., 5th ed.), " The repayment of money lent on bottomry does in general depend upon the prosperous conclusion of the voyage ;" and *Park*, in his chapter on Bottomry and Respondentia, citing 2 Blackst. Com. 457., uses the words, " It is understood that if the ship be lost the lender also loses his whole money." But *Pothier* writes expressly on this point ; and he does not insinuate that a bond excluding sea risk is void ; but he says, " The lender may make a present of the *nauticum fœnus*, and establish the bond." — *Pothier* (ut supra) s. 4., Du Profit Maritime, p. 84, 85.

It is clear that the Admiralty Court has jurisdiction in a case of hypothecation abroad. *Sansum v. Braggington*, 1 Ves. 443. and *Belt's Supplement*, decided, that a ship pledged abroad by the master for expenses was well hypothecated, and that the part-owners were liable. There the lender had a personal remedy against the owners, the deed of hypothecation being absolute and binding the owners by its terms. But this does not show any

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ground upon which the Court of Admiralty should not have jurisdiction in the present case, where the deed does not profess to bind the owners, but only the bottom of the ship. The courts of common law, having no jurisdiction *in rem*, have been anxious to uphold the authority of the Admiralty Court: they have never adverted to a maritime risk as the ground of the Admiralty jurisdiction upon bottomry bonds; and the want of a remedy in those courts entitles this case to a favourable consideration. The reports furnish several cases to prove, that a marine risk is not necessary to make a hypothecation. In *Menetone v. Gibbons* there was nothing to show whether the instrument was a bottomry bond strictly so called. *Ladbroke v. Crickitt* establishes at least that a bond of hypothecation of the same description as the present has been made the ground of a decree in the Admiralty Court. They further cited *Bridgman's case*, Hob. 11. Moore 918. *Scarborough v. Lyrus*, Latch. 252. *Corset v. Huseley*, Comb. 135. *Benzen v. Jeffries*, 1 Lord Raym. 152. *Johnson v. Shippen*, 2 Lord Raym. 982. 1 Salk. 35.

Hullock B. — The judgment of the Court of King's Bench in *Ladbroke v. Crickitt* leaves the present case quite free. Indeed it may be inferred from the bond in that case that there was a sea risk.

After the argument the Court having directed a search to be made, whether any cases could be found in which the Court of Admiralty had entertained a suit upon a bond, professing to be a bottomry bond, but which excluded maritime risk;

five bonds were on this day produced, viz. the *Fame*, *M'Known*, dated 1799; *Maria*, *Burton*, 1800; *Jack*, *Pedder*, 1807; *Maria Dolores*, *Fremel*, 1811; *Mayflower*, *Alexander*, 1815. Of these cases, it was admitted, not one had been brought to the notice of the Court of Admiralty. In the *Mayflower* alone an appearance was given for the owners, and an act on petition entered into and concluded; but the opposition being confined to the charges, and not at all respecting the validity of the bond, the case was ultimately disposed of upon arbitration, and never received a judicial investigation. The counsel for the Appellants did not rely upon these five cases as adjudged cases, nor as precedents, but in order to show that they had passed in the common routine of business, without an objection being raised to the validity of any one of the bonds, of which the general character and description was — hypothecation without sea risk.

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After some observations upon these cases, the Court directed the question to be argued, Whether the amount of interest reserved in the bond under consideration was or was not more than legal interest.

For the Appellants. — The obvious intention of the parties was to make a bottomry bond, and that consideration disposes of the question; because, whether the interest reserved was twelve *per cent.*, or any other sum, it was a maritime interest. If the contract is to be impeached as usurious, the burthen of proof rests with the other side: but there is nothing to show that it was usurious. By the 13 G. 3. c. 63. s. 30., interest at twelve *per cent.* is allowed in the *East Indies*; the words of

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which statute run with no sensible variation from 12 *Ann. st. 2. c. 16.* To construe the interest in this bond usurious, it must be shown that there was a corrupt agreement for more than twelve *per cent.* It is not sufficient, as in the present case, that by possibility the sum may exceed the rate of legal interest, but it must appear that the bond-holders, at the time, actually contemplated extortion. No case has decided that a mere casual and possible excess of legal interest will invalidate a contract. Usury, which is to avoid a deed, cannot be presumed. Here the time of sailing, and the duration of the voyage, were uncertain: the vessel was not bound to leave the port of *Calcutta* for 15 months after the execution of the bottomry bond. It was, therefore, anticipated that such a period would elapse before the ship might sail; and the voyage frequently occupies six months. It can be proved by calculation, that at the time the bond became payable, no interest, beyond the legal rate, was due. *Hawkins, c. 82. s. 29.* lays it down in broad terms, "that if the interest be only put in hazard, and the principal secured, the whole is usurious;" but the cases cited in the margin do not bear him out. *Long v. Wharton, 3 Keb. 304.* is not an authority on a question of this kind. *Bedingfield v. Ashley, Cro. Eliz. 741., Roberts v. Trenayne, Cro. Jac. 506., Chesterfield v. Jansen, 2 Ves. 124. 1 Atk. 301.,* do not support the case. The dictum of *Dodderidge J.* in *Roberts v. Trenayne* is an authority for the position in *Hawkins*; but that differs from the present case; because here the rate of interest may be short of the legal limit fixed by the statute. There is no authority to show that an uncertain contract is usurious.

For the Respondents. — By bare possibility the

sum reserved might not exceed legal interest; but this could scarcely happen except in the event of the ship not sailing for fifteen months, and of an unusual and improbable length of voyage. The parties contemplated more despatch; and the bond stipulates for the immediate repair of the vessel. The principal advanced is not put in hazard; and the calculation of premium (for interest it is not called) was clearly for the voyage.

The Court then stopped the argument, and observed:—there was enough to show that the parties contemplated a maritime interest for the voyage; and that *ex concessis* a maritime risk was then necessary. The bond, therefore, could not be acted upon, and was void.*

Sentence affirmed.

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INDUSTRY. CAPITER.

THIS was an appeal by the owners from an award of salvage made at *Great Grimsby* by three magistrates for the county of *Lincoln*. The salvors appeared under protest, and, referring to the 1 & 2 G. 4. c. 75. s. 9. alleged, that the award was made on the 27th of *October*, 1825, and communicated to the owner's solicitor on the same day, and that no notice of appeal was served until the

obtaining the judgment of the High Court of Admiralty; the ten days having expired, the award is conclusive. *Al. allowed nomine expensarum. Semble, that verbal notice to the magistrates' clerk is not sufficient.*

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The stat. 1 & 2
Geo. 4. c. 75.
s. 9. requiring
the parties dis-
satisfied with an
award of magis-
trates in a sal-
vage case, to
declare, "within
ten days after
such award
is made, and
not afterwards,"
their desire of

* See *Simonds and Loder v. Hodgson*, 6 Bing. 114.

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7th of *November*, which was not within ten days, the time prescribed by the statute.

The owner of the cargo, Mr. *Consitt*, a merchant at *Hull*, stated in his affidavit, "that on the 24th and 27th of *October*, he had informed the magistrates, that if they awarded any salvage he should appeal; that on the afternoon of the 27th when he left *Grimsbj* no award had been made; that the first information he received of it was by a letter on the 31st; and that on the 1st of *November* he gave verbal notice to the magistrates' clerk of an appeal, and requested a copy of the proceedings for that purpose; that on the 3d he signed a notice to each of the magistrates to the effect, that he should appeal; that these notices were received on the 6th at *Grimsbj* in order to their being served; but that the 6th being on a *Sunday* the service was delayed till the 7th when it was effected; and that on the 8th a copy of the award was first communicated to the deponent's agent, and by him transmitted to the deponent."

Jenner for the owners. — The award of 40*l.* and the expences is excessive; the whole value of ship, freight, and cargo, not exceeding 120*l.* No valid objection to this appeal can be raised; for, 1st, the award was not signed till the day after that upon which it was dated, and 2dly, though the notices of appeal were not served till the 7th, yet the postponement was unavoidable as the 6th happened to fall on a *Sunday*: the service on *Monday* must therefore be considered as within the time named in the statutes. The property in the present case was small; but to support this protest would establish a dangerous principle, and one that might frequently affect important interests.

Per Curiam. — Was the award in the first instance committed to writing? The act, I think, absolutely requires that it should be in writing.

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Jenner. — The inference from sections 9 and 10 undoubtedly is, that the award should be in writing; the ninth section directs, that a copy of the award on unstamped paper should be transmitted to this Court. In the present case, however, it was clear, and from the affidavit of the magistrates' own clerk, that the award when made was not put into writing.

Lushington for the salvors. — The statute is express and imperative, that the notice of appeal to the magistrates "should be made within ten days, but not afterwards." Admitting therefore that the award was not even made till the 28th of *October*, still the notices should have been served on the 6th of *November*. It was true, that the 6th happened to be a *Sunday*, on which account a process of this nature could not under the 29th *Car. 2. c. 7.* be legally served on that day; but then it was the duty of the appellant to have adverted to that circumstance, and provided against the expiration of the time by an earlier service. The day of the date of the award must be taken as one of the ten days allowed by the statute. This is manifest from Lord *Mansfield's* observations in *Rex v. Adderley*.* But whether this award were signed on the 27th or 28th, it bore date on the 27th of *October*: and that was sufficient to sustain the protest, for the words of the statute are "within ten days after the award be made;" and the magistrates' clerk, upon whose affidavit reliance was placed to show that the award

* 2 Doug. 464.

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was not signed till the 28th, deposed to its being made on the 27th.

JUDGMENT.

Lord *Stowell*. — This is a case which does not call upon me to decide upon the merits of the salvage transaction out of which the present question arises. Whether this protest, founded on a statute trenching undoubtedly on the ancient jurisdiction of this Court, must be sustained or overruled is the only point for my consideration. The statute of *G. 4.* in giving an opportunity of appeal, has limited the time to ten days, and that in strong terms, not only affirmatively but negatively; for the language of the ninth section is, “within ten days after the award is made, but not afterwards;” a form of expression by which the Court is necessarily much narrowed in its construction of the act of parliament.

The vessel, it appears, was carried up to *Grimsby*; and the question of salvage was heard before three magistrates of the county on the 24th of *October*, when witnesses were examined; the matter was then adjourned to the 27th when again the same parties attended; and on that occasion they were prepared, I must suppose, or at least ought to have been prepared to do what was necessary on the award. The award was made on that day and announced. *Mr. Consitt*, one of the owners, was dissatisfied, and determined to appeal; but it has happened that the communication of this appeal to the magistrates was not made till the 7th of *November*, which is beyond the time prescribed. It is then impossible for me to entertain this as a regular appeal; the party should have attended

to the requisites of the statute; and if he were inattentive this Court cannot assist him. There is, I understand, the utmost facility of communication between the towns of *Hull* and *Grimsby*, by passage-boats twice a day. The magistrates gave 40*l.* in the exercise of their discretion; and the owner by his inattention has debarred himself from the benefit of an appeal which the statute allows under certain regulations; I must then consider the award conclusive, and I certainly shall not introduce myself into this appeal. The only difficulty is as to the costs incurred by the salvors who have been unnecessarily brought before this Court; and in that matter, I shall allow them 4*l.*

Appeal dismissed.

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MULGRAVE. GARBUTT.

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1827.

THIS was a cause of salvage, instituted on behalf of *Hugh Gill*, sole owner of a fishing-smack. The circumstances were as follows:—

About 7 o'clock P. M. of the 5th of *November*, 1826. The *Ebenexer*, laden with a cargo of had-docks and navigated by seven persons, whilst passing through the *King's Channel* off *Harwich* on her way to the *London Market*, was hailed by the *Mulgrave*; and after some negotiation the master of the smack and three of his mariners agreed (after having asked 80*l.*) for 60*l.* to render their assistance: they accordingly worked at the pumps

Where a vessel in distress entered into an agreement with the master of another vessel for assistance for a sum certain, the Court cannot entertain a claim from the owner for salvage.

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during the night, the smack keeping in company. About ten the next morning, the assistance of six further seamen were obtained from two other vessels; and to these the captain of the *Mulgrave* gave 35*l.* The ship reached *Gravesend* about six P. M. of the 6th. The value of ship and cargo was 10,400*l.* By the delay thus occasioned the owner of the smack suggested a loss on his cargo of 26*l.*; for the recovery of which he entered the present action: 60*l.* had been brought in and tendered, together with such expenses as were due by law, in full for salvage services.

Lushington for the owner.—The owner is entitled to a compensation: his vessel was detained and the crew left it to assist the *Mulgrave*.

Addams, contra.—This is not a salvage case. The whole was matter of agreement. I admit that if a vessel were met in extreme peril and received assistance, the Court would consider the detention and loss. In the case of the *Phoenix* (*Michaelmas* term 1826,) the Court held that, generally, owners were not entitled.

JUDGMENT.

Lord *Stowell*.—This vessel, in the course of her navigation, experienced some damage in running upon a wreck: she was in some danger, and there was a necessity for assistance. The men of the *Ebenexer*, the first that applied, entered into a bargain, which may be supposed hard enough—smart enough for the service, since it is well known that there are abundance of smacks in that part of the Channel, so that additional assistance might easily have been obtained. The *Ebenexer* was a fishing smack; and it is quite

evident, that if a smack of that description with her cargo on board, were to be detained, it would bring the fish to a bad market. An agreement was made with the vessel in distress, and it was made by a negotiation which received its accomplishment by a performance of service. It is said the owner of the smack must have suffered some injury by the detention of the vessel; and, perhaps, the Court would have considered his claim, if the present case had been a case of salvage; but it is one of contract, and I cannot entertain the question: were I, however, owner of a vessel of this magnitude, I should make no hesitation in acceding to the demand. I pronounce against the action, and dismiss the parties who appeared to defend it, but not with costs.

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HARVEY. PEACH.

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WILLIAM THOMAS sued for wages as second mate, (to wit, at the rate of *3l. per month*), during a voyage to *Van Dieman's Land* and *New South Wales*, and back to *Great Britain*. In the schedule to the ship's articles his name was entered in that capacity; but no rate of wages, either by the month or for the voyage, was affixed to his name. The period of service was from the

A man being entered in the articles as second mate, but with no rate of wages affixed, the Court held, first, that such omission let in parol evidence of an agreement; secondly that the parol evidence establishing that

the man was taken out of friendship to the father on a trial voyage, and with certain indulgences and advantages amounting to a valuable consideration in lieu of wages, a claim for wages was not sustainable, especially as the master had at all times denied that any wages were due.

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7th *November*, 1824, to 30th *May*, 1826: and the vessel had earned considerable freight both out and home. The demand was opposed on the ground;—that the claimant had been taken the voyage out of friendship to his father, and upon the distinct understanding that he should receive no wages, but should sleep and mess with the cabin passengers. His incapacity for the office of second mate was also pleaded.—These statements were denied; and attempted to be disproved.

Addams, for the mariner.

Dodson, contra.

JUDGMENT.

Lord *Stowell*.—The case*, urged as a decisive authority for the present, contains no small resemblance in many circumstances, and even in its foundation; they are both of them cases of young men, not previously much educated to the sea, and both of them entrusted to their respective captains for the purpose of an education in sea service, and for various stations in it; but with all these features of resemblance, they appear to me very distinguishable on the grounds upon which a decision should be respectively applied to them. One of these grounds certainly is, that in the former case, a debt was actually acknowledged, by a tender made to the party, which reduced the whole question to a mere question of *quantum*. The young man in the former case must have been a person of singular talents for the occupation in which he was then engaged; for with very little preparation for its duties, he qualified himself

* The *Porcupine*, *Laing*, Vol. I. 378.

in the course of his voyage to execute the duties of important stations, with sufficient ability, both as first and second mate. But upon the demand of wages, the captain, who was likewise owner of the vessel, refused all payment on account of no particular wages being specified in the mariner's contract: afterwards, however, he submitted to a payment, thereby acknowledging a debt, and reducing the whole question to a question of *quantum*. There was another point which entered deeply into the consideration of the Court: the captain, notwithstanding the testimonial given by himself of the general good behaviour of this person, by way of set off against the demand of wages charged him with dishonesty and petty thefts, in the proof of which there was an entire failure; and the Court was clearly of opinion, that full satisfaction was due to him for such an unfounded attack upon his moral character.

This case sets off with the same circumstance, that no wages are specified for this young person in the mariner's contract; but beyond that common circumstance, there are some great diversities between the two cases. Here the father was an old and intimate friend of the captain, a pilot of character, who had lived with him much in the habits of private intimacy, and had often navigated this ship down the Channel: the intimacy so produced led to a request from the father to the captain to take his son (who had performed a trial voyage to *China*) upon a trial voyage; the proposal was willingly accepted. He was to sail with the nominal character of second mate, and subsequently of boatswain; he was to sleep in the cabin, and to mess in the cabin; in-

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dulgences of more pecuniary value than would have been equal to the regular wages. It appears, likewise, that the captain paid wages to other persons to act as private tutors to him, in the different stations to which he was appointed, but not so well, personally, qualified to discharge. These were all valuable considerations for such services as he could give, besides the opportunity of acquiring maritime science and experience in the course of a long voyage. Upon the return to England, a demand is made for wages, and is refused; that refusal is maintained to the present moment; and it stands, not upon a question of *quantum*, but upon a denial of all obligation of payment, founded upon the original contract, and upon the valuable considerations which under it he had enjoyed. The question then comes to the meaning of this original contract. This contract is left imperfect in the articles, and it is open to both parties to supply the deficiency by parol evidence. The statute 2 Geo. 2. c. 36. s. 2. says, that such "agreements and contracts" are "conclusive and binding;" but those terms are not applicable to articles which bind to nothing, and which specify no consideration. It was the intention, undoubtedly, of the Act of Parliament, that written articles should in all cases be framed; and the inconvenience which has taken place in these two cases proves the expediency of such a regulation. But there may be justifying cases, where such an omission may occur. Very young persons, not intending to ship as apprentices, but making trial voyages, and the captains who accept them, may find considerable difficulty in settling before-hand a proper *quantum meruit*, and an omis-

sion will then almost unavoidably occur. In such cases reference must be had to parol explanations of the original understanding of the agreement; and, here, I am strongly of opinion that the preferable explanation is to be found on the side of the captain: for, on the other side, no explanation is furnished to the Court by any admissible evidence; for the father of this young man, interested as he admits himself in this suit, is, on this account, a disqualified witness; and no other material proof is offered.* On the part of the captain there are several witnesses, and among them Mr. *Evans*, whose testimony alone, if true, is decisive upon the subject: and I do not think it a sufficient objection to his testimony, that his conversations with the captain in respect to this young man are not to be found in the allegation as well as in his evidence — that is a technical objection, not to be too strictly applied. This witness assisted when the articles were signed, and he deposes expressly that when *William Thomas'* name was called, the captain replied “No wages:” and that this young man and his father, both of whom were present in the cabin, acquiesced without the slightest objection. The nature of the contract is likewise strongly guaranteed by the transactions that took place, by the indulgences, and by con-

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* At the opening of the cause, an objection was taken to the evidence of *Daniel Thomas* (the mariner's father), and sustained. In answer to the 10th interrogatory, he said — “He has made an advance of 15*l.* on account of the expense of carrying on the proceedings, and has given bail: he supposes he would be liable for the same, and for the other expenses incurred by his son, in case he should not succeed in his demand.”

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siderations which were paid for the assistance this young man received. Upon the whole, regretting that resort has been had rather to an expensive litigation than to ancient habits of kindness, I think myself not authorized to pronounce for this demand.

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PORTSEA. LAMB.

A vessel being sold under a decree of the Court of Admiralty in a suit of subtraction of wages, the Court, having no cognizance of mortgagees, will not order the surplus of the proceeds to be paid to a mortgagee to whom possession had never been given, but will direct such surplus to remain in the registry, subject to such order as may come to the Court.

THIS vessel had been sold, in *August 1826*, under a decree of the High Court of Admiralty, at the instance of several seamen in suits for subtraction of wages. The proceeds amounted to *2607l. 15s. 6d.*; the balance was *1500l.* At the time the sale was effected, no appearance was given by the representative of *William Shephard*, the late owner. On the first session of *Hilary Term*, *Thomas Shephard*, sole executor of *William*, prayed that the balance of the ship's proceeds remaining in the registry might be paid to him, when a proctor on behalf of *John Middleton* alleged that he was the legal holder of a bond of hypothecation for monies advanced by him on the security of the said ship and freight, that he had entered an action against the proceeds, and now prayed a warrant to arrest the same.

An act, on petition, was entered into, in which it was alleged that *William Shephard*, whilst living, the sole owner of the *Portsea*, did, in *August 1824*, when the ship was in the port of *London*, and

about to proceed on a voyage to the *East Indies*, borrow of *John Middleton*, on the security of the vessel, 3000*l.* sterling, for the repayment whereof with interest at 5 per cent. *Shephard* did, by a certain deed or indenture dated 13th *August* 1824, bargain, sell, assign, transfer, and set over to *Middleton*, his executors, administrators, and assigns, the ship, her tackle, apparel, furniture, and appurtenances, with all policies of insurance effected or to be effected thereon, and all the estate, right, title, interest, property, claim, and demand whatsoever of him, *Shephard*, of, into, or out of the same, or any part thereof. And all bills of sale, certificates of registry, deeds, and writings whatsoever to the vessel belonging, to have and to hold the same upon trust, and with power to sell the same for the repayment and satisfaction of the principal sum of 3000*l.* with interest as aforesaid: provided that the 3000*l.* with the interest should be paid before the 13th of *August* 1826. That no part of the sum so advanced and secured upon the hull and bottom of the ship had been paid; and that *Middleton* had no security whatever for the same, or any part thereof, save the ship, or the proceeds thereof.

On the other side it was alleged, that the deed referred to was an indenture of mortgage under seal; and was not in any manner cognizable by the authority of this Court. That the deed was made and given as a collateral security only for the money lent and advanced, and the legal remedy can only be against the executor of the mortgagor; that the vessel having been sold under the authority of this Court, the balance of the proceeds in the registry forms a part of the per-

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sonal assets of the deceased, which the executor is bound to administer according to law; and that if the balance should be paid to *Middleton*, the remaining creditors would be unjustly deprived.

Lushington and *Addams* for the mortgagee.

No question arises on the validity of the deed; it is not opposed, and it is admitted that the money has not been repaid. It is objected, on the part of the executor, that the Court has no jurisdiction; and secondly, that if it has, the proceeds must be decreed to him. The circumstance of the deed being under seal is of no importance, since the Court has jurisdiction over the subject-matter; and the mortgagee only is applying for a continuance of the exercise of that jurisdiction; he is not suing originally, as mortgagee, to arrest the vessel. The Court enjoys a large jurisdiction over proceeds in its registry: they have been granted out to material men, — *The John*, JACKSON*, — and an undisputed mortgagee may be considered as analogous in his title to material men. In the *Flora*, FINDLAY†, it was held that the Court of Admiralty was bound to notice debts on record. Here is a similar claim, — the mortgagee is entitled to the money, and has a specific lien on the ship. The money must ultimately come to him, for the demand is not disputed; and the executor cannot have it for a general distribution among the creditors. That the bond was dated prior to the 6 *Geo.* 4. c. 110. does not, we conceive, alter the case. ‡

* 3 Rob. 290.

† Vol. I. 298.

‡ In section 45, it is enacted, "That when any transfer of any ship or vessel, or of any share or shares thereof, shall be

Jenner, contra. — The executor is bound to protect the general interests of all creditors. *Middleton* was never in possession of the vessel: the possession always remained in the owner; and the creditors who furnished the necessaries for fitting out the ships, supplied them upon his credit. I agree that if the Court of Admiralty has an original jurisdiction over an instrument, the mere accidental circumstance of a seal will not deprive it*; but here is a contract entered into on land between two *British* owners. Some analogy was attempted between mortgagees and material men.

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made only as a security for the payment of a debt or debts, either by way of mortgage or assignment, to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry (in manner hereinbefore directed), state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares, so transferred, available by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made."

See the observations upon this statute in *Abbott on Shipping*, p. 26. 5th edition.

* See the cases in *Abbott on Shipping*, pp. 126-7. 483. 5th edition.

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Per CURIAM.— The cases of material men are very different: the Court has always been inclined to consider them as privileged.

Jenner.— If the mortgagee had obtained possession of the ship, and it had been taken from him by the authority of the Court, he might have had a lien and a preference, so as to bring the case within that of the *Flora*. The executor is bound to give preference to a specialty creditor; no inconvenience, therefore, will arise to the mortgagee from payment of these proceeds to the executor.

Per CURIAM.— I shall direct the money to remain in the registry, subject to such order as may come to the Court. *

March 12th,
1828.

The interest of a mortgagee is not a question for the decision of the Admiralty Court.

* In the *Exmouth*, OWEN, the ship having been sold in a suit for wages, and the claims of the crew and for pilotage being satisfied, the assignees of the owners applied for the surplus proceeds, viz. 3500*l.* to be paid out to them.

The *King's Advocate*, for a mortgagee, cited the *Portsea*, and submitted that the money should remain in the registry to await proceedings in Chancery.

Lushington contra.

Per CURIAM.— *Sir Christopher Robinson.* The interest of a mortgagee is not a question for the decision of the Admiralty Court. (a) I direct the proceeds to be invested in Exchequer bills.

Note.— On 2d of *March*, 1830, the money remained so invested.

(a) See *Fruit Preserver*, BROWN, *infra*.

FRANCES MARY. KENDAL.

March 28th,
1827.

THIS proceeding was at the instance of Lord Napier, the commander, and the rest of the officers and crew of H. M. S. *Diamond*, against the *Frances Mary* and her cargo, and also against *Robert Mackie* the claimant. The act on petition alleged that on the 24th June, 1826, H. M. S. whilst on her voyage from *Rio de Janeiro* to *Lisbon*, fell in with a large vessel, water logged, destitute of every species of rigging, her bottom and sides covered with barnacles and weeds, and wholly abandoned. Measures were immediately taken to navigate the derelict to the island of *St. Mary's* the nearest port; and on the evening of the 27th June, having put her in charge of Mr. *Brown*, the second master of the *Diamond*, three midshipmen, and eight seamen, with a boat and provisions for two months, she parted company from the *Diamond*. On the 24th of July, the vessel was got close to *St. Mary's* when it was necessary to obtain the assistance of a small schooner, four boats, a pilot, and thirty men, in order to tow her into port. The vessel was, after some interruption by the *Portuguese* authorities, hauled up on the beach; a new rudder was made, and on the *Diamond's* reaching the island on the 14th of August, the wreck was towed to *St. Michael's*, where having been fitted with pumps and her jury rudder secured, she was removed to the island of *Terceira*, for the advantages of its harbour. On the 31st, the *Diamond* sailed from *Terceira*, towing the derelict, and after

In a case of derelict of extraordinary merit where the proceeds were 600*l.* and the number of salvors four hundred, the Court inclined to give a larger sum, but finally gave only a moiety (as no precedent of the allowance of a larger proportion could be produced), and directed the costs to be paid out of the other moiety.

FRANCES
MARY.

March 28th,
1827.

a succession of variable weather, reached the outer anchorage of *Milford Haven* on the night of 24th *September*; and on the evening of the 26th, was secured, with the assistance of a steam-boat, off the naval dock-yard at *Pembroke*.

The proceeds of the ship and cargo were estimated at 600*l*. There were 400 salvors.

The *King's Advocate* and *Jenner* for the salvors.

The facts are not disputed; and the salvors are entitled to more than a moiety.

Lushington and *Salisbury* contra. Where the vessel is claimed by a private owner a moiety cannot be exceeded. *L'Esperance*, 1 *Dod.* 49.

The *King's Advocate* denied that there was any such settled rule.*

Per CURIAM. The fund is unfortunately small, but it is a case of very extraordinary merit, and the Court should be liberal. I incline to decree 350*l*. and if an instance can be produced in which, in a case of this description, the Court has exceeded a

February 5th,
1811.

A moiety and costs given in a case of derelict of the value of 5668*l*. where the salvage had been effected with great exertion and risk.

* RELIANCE. WILEY.

This timber ship was found near 300 leagues out at sea, on the 26th of *June* 1809, by H. M. Gun-brig *Virago*: she had been long deserted, having been examined by another ship a month before. The ship was about 600 tons; the gun-brig only 185. With great exertions and risk the crew of the gun-brig patched up the ship and towed her to Plymouth, putting themselves on short allowance. They were occupied 36 days. The value of ship and cargo was estimated at 5668*l*., and the salvors asked two-thirds.

Per CURIAM. — This is a case of great merit of different species, and I am inclined to give as much as is usually given. It is only in very particular cases that the Court gives more than a moiety. Here the value is large. I content myself with giving a moiety, and I direct the expences of the salvors to be taken out of the other moiety.

moiety, I will award the sum I have mentioned; but if not, I shall direct a moiety to be paid to the salvors.

FRANCIS
MART.

March 28th,
1827.

Note. — On the 18th of *May* a moiety was decreed to the salvors, their expenses being first paid out of the other moiety.

PRINCE OF AUGUSTENBURG.

May 15th,
1827.

THIS ship and cargo, the property of the *Danish East India* Company, were condemned at *Calcutta* as droits of admiralty; and upon an application to the Lords of the Treasury on behalf of *Peter Leisner*, the purser, to be indemnified for the condemnation of his private adventure, the matter was referred to this Court.

The private adventure of a purser in a *Danish East Indiaman* (the ship being condemned as droits of admiralty at *Calcutta*) restored.

Jenner. — The private adventures of the master, and several of the officers of this, and many other *Danish* vessels, have been restored by the Court; but there is no instance of a restitution to pursers on board *Danish East Indiamen*. They act, however, in a similar capacity to pursers on board the *English East India* Company's ships; are the third ship's officers; are called "assistants;" have only nominal wages, without any commission on the cargo, but are allowed private adventures free of freight. A purser therefore is materially distinguishable from a supercargo; and being an essential officer on board these *Danish* ships, is entitled to the privilege conceded to the masters and other officers of *Danish* vessels. — He then moved the Court "to decree

PRINCE OF
AUGUSTENBURG.

May 15th,
1827.

restitution of the private adventure, and to direct the proceeds to be paid to the claimant or his attorney.”

The *King's Advocate* observed, that in the *American* war the claims of supercargoes were in a few instances disallowed. He did not oppose the motion.

Motion granted.

June 8th,
1827.

JANE VILET. TINDELL.

Where a bottomry bond is admitted to be drawn in legal form and entitled to payment, the parties are bound by the terms of the agreement; and the Court will not refer the matter to the registrar and merchants to make such a deduction on account of the rate of exchange as is made in ordinary cases of mercantile negotiation.

THIS was a cause of bottomry. The bond recited that in *August, 1826*, the master of the *Jane Vilet*, obtained from *Brown, Hoyles, and Norris*, merchants at *St. John's Newfoundland*, the sum of *231l. 5s. 1d. sterling*, to refit the vessel; which sum was to run as *respondentia* on the block and freight, at a premium of fifteen *per cent.* for her return voyage to *Liverpool*; and that the principal and premium, amounting together to *265l. 18s. 10d. sterling*, should become due in ten days after the ship's arrival at her moorings at *Liverpool*; or, in case of her loss, such an average as by custom shall have become due on the salvage.

Jenner for the bond-holder.

Lushington, contra.

JUDGMENT.

Lord *Stowell*. — This is a bottomry bond, admitted to be drawn in a legal form, and as such

entitled to payment. These bonds have always been regarded as matter of serious obligation, protected by the terms of agreement between the lender and the borrower ; nothing else is looked to but what the lender demands and the borrower agrees to ; nobody has a right to alter that agreement. The demand so agreed to is the true measure of the contract, and cannot be altered or modified by either party. In the present case the bond is fully submitted to, but the party who is to pay claims a reduction, on account of an usual reduction which takes place in payments of an ordinary kind, and he desires a reference to the registrar and merchants.* This, however, is not a mercantile case ; it is a question of law (if it be a question), upon which a Court holding plea upon such contracts is entitled to decide ; and such a reduction in my opinion is not at all applicable to a written contract of this high nature. The extent of the necessity is measured in the original contract, and cannot be reduced by rules that apply to cases of ordinary negotiation ; the only effect of it would be that a higher demand would be made in such cases by the lender. I am of opinion therefore that no such right exists, and that it cannot be extended to a contract of so sacred a character ; it would be nugatory if it did. I pronounce for the obligation expressed in the contract with costs.

JANE VILETT.

June 8th,
1827.

* It was stated on affidavit, "that it was the constant custom to reduce the *Newfoundland* sterling money, when payable in *Great Britain*, into *British* sterling money, according to the rate of exchange between the two places."

Nov. 6th,
1827.

THE SLAVE, GRACE.

The KING, and His Majesty's
PROCURATOR-GENERAL, and } Appellants ;
GEORGE WYKE, }

versus

JOHN ALLAN, Esq. Claimant, - Respondent.

On Appeal from the Vice-Admiralty Court of Antigua.

A female attendant, by birth and servitude a domestic slave, accompanied her mistress to England, resided there for a year, and then voluntarily returned with her mistress to the place of her birth and servitude: though during the residence in England no dominion, authority, or coercion can be exercised over such person, yet, on her return to her place of birth and servitude, the right to exercise such dominion revives.

IN 1822, Mrs. *Allan* of *Antigua* came to *England*, bringing with her a female attendant, by birth and servitude a domestic slave, named *Grace*. She resided with her mistress in this country until 1823, and accompanied her voluntarily on her return to *Antigua*. Mr. *Wyke*, collector of the customs at *Antigua* and the original prosecutor of the present suit, was a passenger on board the same ship. On their arrival at *Port St. John*, in the island of *Antigua*, *Grace*, with whose character and situation Mr. *Wyke* was well acquainted, landed with her mistress, without any exception made to her condition, and without any formalities at the custom-house observed or required. She continued with Mrs. *Allan*, in the capacity of a domestic slave, till August 8th, 1825, when she was seized by the waiter of the customs at *Antigua* "as forfeited to the king, on suggestion of having been illegally imported in 1823." The information was filed in June, 1826. Mr. *Allan* then made an affidavit of claim, as sole owner and proprietor of *Grace*, as his slave; and Mr. *Wyke*, a single witness, was

examined on interrogatories. On *August 5. 1826*, the judge of the Vice-Admiralty Court of *Antigua* decreed, after argument, "that the woman *Grace* be restored to the claimant, with costs and damages for her detention." *

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1827.

From this sentence an appeal was prosecuted on the part of the crown, and the principal question made, was — whether, under the circumstances, slavery was so divested by landing in *England* that it would not revive on a return to the place of birth and servitude ?

The *King's Advocate* and *Lushington* for the Appellants.

Jenner and *Dodson*, contra.

JUDGMENT.

Lord Stowell. — This case commences with an information against a woman named *Grace*, who attended her mistress as a domestic servant to *England*, and returned with her to *Antigua*; and consists, in the first place, of various counts charging omissions of regulations imposed upon the importation and exportation of slaves to and from the *West India* colonies; and, in consequence thereof, condemnation, or forfeiture to his Majesty, is contended for.

I have to discharge a debt of obligation to the counsel who have argued this cause on both sides, and have taken great pains in elucidating questions that arise upon it. I have likewise to discharge a

* The damages were, upon the report of the registrar, ultimately fixed at 36*l.* 6*s.* currency, the award being made at the rate of 2*s.* per diem. The appraised value of *Grace* was 125*l.* currency.

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duty which I owe to the Judge below *, who has examined the case with very meritorious diligence and acuteness, and thrown very considerable lights upon the general subject. I could have wished that, in a case so novel in this Court, it had been furnished with more both of argument and evidence than I have met with in the process which has been transmitted from the inferior Court. What the arguments were on either side of the question in the Court below, what opposition was given to the doctrines maintained by the Court, and by what evidence that opposition was supported, or by what arguments resisted, these papers do not inform me. In a case so important, and unprecedented in this Court, I am left to conjecture what the arguments were from other public papers supplied by the Advocate-General who argued the cause in the Court below, which papers were transmitted to the Secretary of State for the Colonies, and by him or his officers, I presume, submitted to the House of Commons.† *That* is not the way in which the superior Court usually collects information of what passes in the inferior Courts. But these documents come in a form to which I may, I think, without impropriety advert, as containing the probable grounds of opposition in the cause, and on which the Judge decided in a way consistent with his view of the question.

The case begins with an information or charge consisting of five counts; the two first of which may be immediately dismissed, being not at all

* Dr. Nugent.

† These papers were, on *May 2. 1826*, ordered by the House of Commons to be printed.

applicable to the real state of the parties and only urged by the Advocate-General, as he expresses it, "*ex abundanti cautela*," without any expectation of their influencing the judgment. What sort of *abundant caution* could arise from the introduction of matter which, I understand to have been admitted by the Advocate-General, could not have the slightest influence on the cause I am not informed and find some difficulty in discovering it; but from the papers transmitted I collect that this *cautela abundans* is founded upon a supposition of the Advocate-General that a slave, who had been in *England* and returned again to the colonies upon any pretence whatever, was by such residence only entirely enfranchised and became a free person, and was so to be considered in that colony, — an assertion which brings that great question directly before the Court.

Having disposed of the two first counts I proceed to the third and fourth. The third count pleads, that "this woman, *Grace*, after the 1st of *January*, 1820, was exported as a slave from the island of *Antigua*, a colony under the dominion of his Majesty, and carried to *Great Britain*, a territory to his Majesty belonging, without production of certificate of registration and without such certificate having been endorsed by the collector and annexed to the clearance or permit given for the exportation of the said *Grace*." The fourth count pleads, that "after the 1st of the said month of *January*, 1820, *Grace* was unlawfully brought into and landed in the island of *Antigua*, a colony to his Majesty belonging, from *Great Britain*, a territory to his Majesty belonging, as a domestic slave in attendance upon the person of her mistress,

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without any extract and certificate of registration being on board the ship in which the said *Grace* was imported, and together with her on her arrival produced to the Collector of the Customs, contrary to the form of the statute :” and it has been contended that under the statute, the 59 *Geo. 3. c. 120. s. 12.* it was necessary that this person should have had these credentials, as well on the voyage from the colony to the mother country, as also on the return voyage to *Antigua*.

The regulations in the 59 *G. 3. c. 120.* were made to prevent slaves being transferred from one of our own colonies to other settlements, and also the introduction of new slaves into any of our colonies, but have no reference to the transit of slaves to or from this country and its colonies.

It appears to me, on a consideration of the Act referred to, that it never was intended to put any restraint on a domestic slave accompanying his master to *Great Britain*, or on his being taken back from *Great Britain* to the colonies. The regulations were made as well for the purpose of preventing slaves being transferred from any one of our own colonies to other settlements, as also to prevent the introduction of new slaves into any of our colonies, but they have no reference whatever to the transit of slaves to or from this country and its colonies. Upon reference to the act of parliament, I find these words : “ With intent that such slave shall be removed to some other *colony*.” (s. 11.) Nothing whatever is intimated as to *Great Britain*, nor is there any direction that a certificate of registration or indorsement, on the clearance of vessels coming to this country, is necessary ; nor are any such credentials demanded, or considered as demandable, of vessels coming to this country by the Custom-house here, as far as upon inquiry there I know and believe.

I cannot help observing here a little upon the careless manner in which the Custom-house officer at *Antigua* appears to have discharged his duty, if

there is any duty of this kind imposed upon him. He had come in the ship all the way from *England* with the slave and her mistress, and he suffers her to go on shore with her mistress without any papers, if papers were at all demandable; and it is not till after two years that he finds that he had mistaken his own duty, and omitted to demand what he now contends were the necessary documents. I might observe upon the lapse of time between the commission of the offence and the institution of the suit, but I think it unnecessary under the observations already made.

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The fifth count is that which is alone entitled to consideration in this case. It states, that "she being a free subject of his Majesty was unlawfully imported as a slave from *Great Britain* into *Antigua*, and there illegally held and detained in slavery contrary to the form of the statute in such case made and provided." The objection, therefore, which constitutes the foundation of this suit and the ground of unlawful treatment is, that she was a free subject of his Majesty and under that character unlawfully imported as a slave and was so treated. Now this averment must be proved: it must be shown that she was so, for otherwise she has no right to prefer this complaint to the Court; and if that assertion fails, there is no ground whatever for the insinuation of her being unlawfully treated; for that assertion of her freedom is the foundation of the wrong of which she complains: if she cannot plead with truth that she was a free subject there is no ground of complaint in her being treated as a slave: her rights are not violated and she has no injured rights to represent. It may be a misfortune that she was a slave; but being so, she in the pre-

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Slavery is not so divested by mere temporary residence in *England*, without manumission, as to entitle a person after such residence is expired, and after a return to the place of birth and servitude, to maintain a suit founded upon a claim of permanent freedom.

sent constitution of society had no right to be treated otherwise.

I have looked with the utmost attention to discover, if possible, the foundation of her complaint — that she being a free person is treated as a slave. The truth of that complaint depends upon the nature of that freedom, if any, which she enjoyed before the institution of this suit; and I can find nothing that warrants any such assertion of a freedom so conferred. The sole ground upon which it appears to have been asserted is, that she had been resident in *England* some time as a servant waiting upon her mistress, but without the enjoyment of any manumission that could alone deliver her from the character of a slave which she carried with her when she left *Antigua*; for I think it demonstrable that she could derive no character of freedom that could entitle her to maintain a suit like this (founded upon a claim of permanent freedom) merely by having been in *England*, without manumission; for a manumission is a title against all the world. The mode of treatment applied to such persons is a strong illustration between the effect produced by a residence in *England* and that conferred by a manumission; for manumissions are not uncommon in *England* and always granted where there is an intention of giving the party an absolute title to freedom. This suit, therefore, fails in its foundation: she was not a free person; no injury is done her by her continuance in a state of slavery, and she has no pretensions to any other station than that which was enjoyed by every slave of the family. If she depends upon such a freedom, conveyed by a mere residence in *England*, she complains of a violation of right which she possessed no longer

than whilst she resided in *England*, but which had totally expired when that residence ceased and she was imported into *Antigua*; and that is the proposition which I propose to make good in the course of the following observations.

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What is the manner in which a freeman, robbed of his freedom and charged with being a slave, represents the injury done by such wrong-doer? His remedy is immediate and in his own power; for it cannot be maintained, that because the act of parliament for the abolition of the *African* slave-trade describes this prohibition as extending to slaves, "or persons intended to be sold, transferred, used or dealt with as slaves,"* that it is therefore intended to include persons who are *free subjects of His Majesty*. What has a free person relying upon an antecedent freedom to show, but the freedom of which he is so in possession, in order to assert his own right already acquired and to maintain his freedom with all its present consequences? Could it possibly occur to any person in such a situation to submit to the degrading remedy which is here sought for—that is, not to assert his right to a freedom of which he is already in possession? It would, in fact, amount to a disclaimer of any pre-existing freedom. It is a process very fit for the emancipation of a slave, but surely could never be recommended to a person already in possession of a state of liberty freely and fairly acquired.

The mode of obtaining freedom under the provisions of the 47 G. 3. c. 36. s. 1. is very fit for the emancipation of a slave, but inapplicable to a freeman.

There is no statute whatever that imposes upon a free person the vindication of his freedom by submitting to a procedure so humiliating to a freeman

* 47 Geo. 3. c. 36. § 1.

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as to sue for it, at the mercy of the Crown, under a process which places him at the disposal of the officer of the Crown and subject to all such situations as the slave-abolition laws would warrant. Now, that any free subject of the King could be imported as a slave into any of our colonies, and there detained as a slave, appears to be a contradiction in terms. The former charges all describe this person as loaded with the duty of conforming to the obligations of a slave; whereas *this* describes her as a person sailing from *Great Britain* as a *free* subject, and therefore not at all bound to those several obligations which lie only upon *slaves*. The person who sues for his freedom in the manner proposed must submit himself to be apprenticed, or to be enlisted, or placed in some other situation, at the discretion of the officer of the Crown. Is that a manner in which a free person ought to assert his right? What has he to do but to bring his action against the defamer of his rights? and who can doubt but that he would recover most overwhelming damages against the person who had assaulted his freedom, and compelled him to submit to a process that is only applicable to a slave, and to pour upon his gross wrong-doer the whole vengeance of the law? In short, the whole of this procedure is inapplicable to a freeman; it may seem more likely to initiate him into a state of slavery, but it is utterly inconsistent with a spirit of freedom — that spirit which would enable its possessor to resent the outrage with which he was threatened, and, without those degradations, to restore him to himself unaided by such a proceeding as could only be instituted against a person already in a state of slavery. See how a claim of this kind betrays its imbecility.

The party is seized in the first instance by a Custom-house officer, is afterwards handed over to an officer of the Crown, under whose direction he undergoes all the process that would be applied to a slave, — the treatment differs in no respect; he is not at his own volition but at that of his guardian; he is then bound to some trade or enlisted in the army: nothing of free will of his own, or free action of his own — all at the will of another; — showing most completely a process totally different from that which a real free man would, of his own accord, establish by his own exertions, in spite of all the opposition that could be employed against it; whilst the other is only a transit from one species of slavery into another.

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I come now to the discussion of that point which has been already described as the main point upon which this cause must ultimately depend; and that is, whether this person was, at the time she is pleaded to be a free subject of his Majesty, truly and accurately described as a free subject, and in that character entitling this suit to be maintained: and it does not appear to me at all necessary to apologise for entering into such an inquiry; for it is, in truth, the very point upon which the whole essence of the cause depends, and, consequently, the power of supporting it.

I observe that, by the papers transmitted by the Advocate-General to his Majesty's Secretary of State, this notion of a right to freedom by virtue of a residence in *England* is universally held out as a matter which is not to be denied; but it is contested by the Judge upon the ground that the residence in *England* conveys only the character so designated during the time of that residence,

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and continues no longer than the period of such residence. The person who is a freeman in *England* returns to slavery in *Antigua*; that is the whole question in the cause: if to be decided in favour of this female, she has a right to maintain this cause and to claim a judgment; but if, on the contrary, her freedom ceased with her residence in *England*, she has no right to claim it, and, consequently, no power of maintaining the present suit. The Judge of the Court below was perfectly correct in entering into this general question, and required no apology for so doing; for it is really the hinge upon which the whole of this case depends.

The question has been argued as depending upon the interpretation of the well-known case of *Sommersett* *, in which a *habeas corpus* was granted, directed to Capt. *Knowles*, to bring up the body of *Sommersett*, a negro, which was in his possession in irons; with the cause of his detention. The affidavits stated, that *Sommersett* had been bought in *Virginia* and brought to *England* by Mr. *Steuart*, his master; and on his refusing to return was sent by his master on board *Knowles's* ship to be carried to *Jamaica* and sold as a slave. It appears that, some time before, this case was argued upon a question addressed to Lord *Talbot* and to Mr. *Yorke*, whilst Attorney and Solicitor General. They gave it as their opinion, that a slave coming from the *West Indies*, either with or without his master, to *Great Britain*, doth not become free, and that his master's property or right in him is not thereby

* *Howell's State Trials*, vol. xx. p. 1.

determined or varied; and they were also of opinion that the master might legally compel him to return to the plantations; and, as Lord *Mansfield* expresses it, "they both pledged themselves to the merchants in *London* to save them harmless from all inconvenience on such a subject," which pledge was afterwards very fully confirmed by a similar judgment pronounced in 1749 by Sir *Philip Yorke*, then become Lord Chancellor *Hardwicke*, sitting in the Court of Chancery: * both of these persons being great men of that age, and, as Lord *Mansfield* admits, great men in any age. This judgment, so pronounced in full confidence, and without a doubt upon a practice which had endured universally in the colonies, and (as appears by those opinions) in *Great Britain*, was, in no more than twenty-two years afterwards, reversed by Lord *Mansfield*. The personal traffic in slaves resident in *England* had been as public and as authorised in *London* as in any of our *West India* islands. They were sold on the Exchange and other places of public resort by parties themselves resident in *London*, and with as little reserve as they would have been in any of our *West India* possessions. Such a state of things continued without impeachment from a very early period up to nearly the end of the last century.

It appears that Lord *Mansfield* was extremely desirous of avoiding the necessity of determining the question: he struggled hard to induce the parties to a compromise, and said, he had known five cases so terminated out of six; but the parties were firm to their purpose in obtaining a judgment,

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* State Trials, vol. xx. pp. 4. 81.

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and Lord *Mansfield* was at last compelled after a delay of three terms to pronounce a sentence, which, followed by a silent concurrence of the other judges, discharged this negro; thereby establishing that the owners of slaves had no authority or control over them in *England*, nor any power of sending them back to the colonies. Thus fell, after only two-and-twenty years, in which decisions of great authority had been delivered by lawyers of the greatest ability in this country, a system, confirmed by a practice which had obtained without exception ever since the institution of slavery in the colonies, and had likewise been supported by the general practice of this nation and by the public establishment of its government, and it fell without any apparent opposition on the part of the public. The suddenness of this conversion almost puts one in mind of what is mentioned by an eminent author, on a very different occasion, in the Roman History, "*Ad primum nuntium cladis Pompeianæ populus Romanus repente factus est alius*:" the people of Rome suddenly became quite another people.

The real and sole question which the case of *Sommersett* brought before Lord *Mansfield*, as expressed in the return to the *mandamus*, was, whether a slave could be taken from this country in irons and carried back to the *West Indies*, to be restored to the dominion of his master? And all the answer, perhaps, which that question required was, that the party who was a slave could not be sent out of *England* in such a manner and for such a purpose; stating the reasons of that illegality. It is certainly true that Lord *Mansfield* in his final judgment amplifies the subject largely.

He extends his observations to the foundation of the whole system of the slavery code ; for in one passage he says, that “ slavery is so odious that it cannot be established without positive law.” Far from me be the presumption of questioning any *obiter dictum* that fell from that great man upon that occasion ; but I trust that I do not depart from the modesty that belongs to my situation, and I hope to my character, when I observe, that ancient custom is generally recognized as a just foundation of all law ; that villenage of both kinds, which is said by some to be the prototype of slavery, had no other origin than ancient custom ; that a great part of the common law itself in all its relations has little other foundation than the same custom ; and that the practice of slavery, as it exists in *Antigua* and several other of our colonies, though regulated by law, has been in many instances founded upon a similar authority. Much occurs in the discussion of the advocates on that question respecting villenage, but little appears in the decision of Lord *Mansfield* upon that point.

It is not necessary for me to relate the systems which had given way of villenage, pure or privileged, to which this species of slavery was compared, though dissimilar enough in very many respects, as is admitted by most writers on the subject, and amongst other persons by the Advocate-General of *Antigua*, who, adverting to the general system of villenage, ventures very truly to say, “ to which colonial slavery may be supposed to bear some analogy in the absence of more conclusive authority.” These systems of villenage had been long, though silently, extinguished as far back as the reign of Edward VI., at the time when

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Sir *Thomas Smith* wrote, and who says there were then no villeins in gross remaining in *England*.* Villeins regardant survived them some time longer, but these were particular villeins not attached to the persons but to the manor or soil; not, like negro slaves, to be shifted about for the convenience of the proprietor without being attached to any particular manor. I cannot help entertaining some doubt whether the resemblance between villenage and the *African* slavery was so close as to effect by its decay the fall of *African* slavery in *England*. Villenage certainly had not prevented the introduction of slavery into this country, and its open continuance here for many years. It does not appear that the public were startled at the revival of villenage under the new form of *African* slavery. The villeins in gross and regardant were both of a very different kind from that of *African* slavery. Villeins in gross were liable to any commands of their masters. Villeins regardant were attached to particular manors, and to particular services dependent on those manors. They were men of the form, colour, and speech of their masters; born and bred in this country, and not transferable by sale, unless with the lands to which they were attached. The *African* slavery was very differently constituted: persons of a different birth, complexion, and language, and of all the various ranks of which their own country, *Africa*, was composed, and employed in various offices according to the convenience of their owners, and transferable by sale at their pleasure, — unlike the cottagers or handicraftsmen of our own country.

* Commonwealth of *England*, Book ii. c. 10.

It may, perhaps, be doubted whether the emancipation of slaves in *England*, pronounced at the end of the last century, was not rather more owing to the increased refinement of the sentiments and manners of the age than to the decay of the two systems of villenage, one of which had expired two hundred years before, and the other one hundred and fifty years at least, and which then only slumbered in the memory of a few antiquaries. The opinion of Lord *Mansfield* upon this immediate subject makes a very small part of his celebrated speech; it is almost confined to a particular portion of it. There is hardly any thing else that is expressed, save several well-merited civilities to the gentlemen of his bar, and some expressions of contempt for the danger and jealousy that might be encountered, but of which none ever appear to have occasioned any reasonable alarm. Thus fell a system which had existed in this country without doubt, and which had been occasionally forced upon its colonies and has continued to this day — that is, above fifty years — without further interruption.

The arguments of counsel in that decisive case of *Sommerset*, do not go further than to the extinction of slavery in *England* as unsuitable to the genius of the country and to the modes of enforcement: they look no further than to the peculiar nature, as it were, of our own soil; the air of our island is too pure for slavery to breathe in. How far this air was useful for the common purposes of respiration, during the many centuries in which the two systems of villenage maintained their sway in this country, history has not recorded. The arguments of counsel do not go

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further than to establish that the methods of force and violence which are necessary to maintain slavery are not practicable upon this spot; and Mr. *Hargrave*, one of the counsel, who distinguished himself very much in that character by very laborious exertions, almost in direct terms asserts that they cannot go beyond it; for in answer to a proposition which had been made to him, that a modified slavery should be permitted in *England* which would be followed in the colonies, he expressly says (taking it for granted that the modified slavery in *England* would not at all affect the condition of slavery in the colonies), that upon the removal to the place slavery would again attach upon him with all its original severity. It could hardly be otherwise, than that that gentleman was looking towards the necessary continuance of slavery in its severest form, produced by the return of the slave into the colonies. This I take to be the sense of the passage referred to, though expressed in rather an obscure and involved manner.

It is very observable, that Lord *Mansfield*, when he struggles hard to decline the office of determining the question, confines that question almost in terms to this country; he limits it expressly to *this country*, for he says, "the *now* question is, Whether any dominion, authority, or coercion can be exercised on a slave in this country according to the *American* laws, meaning thereby the laws of the *West Indies*? The service performed by the slaves without wages is a clear indication that they did not consider themselves free by coming here." In the final judgment he delivers himself thus: "The state of slavery is so odious that nothing can be suffered to support it but positive law:"

that is, the slavery as it existed in the *West Indies*; for it is to that he looks, considering that many of the adjuncts that belonged to it there were not admissible under the law of *England*.

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Lord *Mansfield* very justly observes, that “if the merchants consider the prohibition of slavery in this country of sufficient commercial concern, an application to Parliament is the best, and, perhaps, the only method of settling the point for the future.” In conformity with this advice, it is much to be lamented that application was not made to Parliament to settle the question upon a right footing, if it were still to be considered as a *dependent* question. It might have saved a world of trouble and suffering to both parties, which is now to be produced by the springing up of this question at a very late hour of the day. Persons, though possessed of independence and affluence acquired in the mother-country, have upon a return to the colony been held and treated as slaves; and the unfortunate descendants of these persons, if born within the colony, have come slaves into the world, and in some instances have suffered all the consequences of real slavery; and the proprietors of these slaves are now called upon to give up to the public all the slaves that they have thus acquired; and this not only in *Antigua*, but most probably in all the islands of the *Archipelago*; for it cannot be supposed that this claim, if maintained with respect to *this* island, will not be extended to all the others. These are matters that might have cost at that time of day comparatively little expense and little suffering; but which now cannot be settled without a gross violation of important interests on one side or the other.

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It appears to me to be a strong presumption in favour of the parties charged with violating the law, that neither the persons so charged, nor those who had an interest in preventing it, have within the space of fifty years that have elapsed, even in one instance, called the attention of *English* justice towards it. Black seamen have navigated *West India* ships to this island, but we have not heard of other *Sommersetts*, nor has the public been much gratified with complaints of their desertion, though it is probable that some may have taken, and not unfairly, the advantage that was held out by the law. I do not think that the fact remaining dormant so long could have happened without some marked difference of its origin and history from that of the ordinary slave trade.

The system of slavery in our *West India* colonies was perfect in every part, if I may use that expression, meaning thereby that perfection which consists in the adequacy of the means to produce the intended effect. It was a system not to be thrown out of use, because it was incapable of being used in the full extent in *England*. With the laws of the colonies it could be conciliated. That system was completely armed at every point; and though frequently softened, as in the case of domestic slaves, it was in no wise deficient in compelling the obedience of its subjects: whereas in *England* it was totally impotent, and the law could not borrow those instruments from a foreign law, which were necessary to make the system work properly. This may have occasioned one great difference between the two systems. The fact certainly is, that it never has happened that the slavery of an *African*, returned from *England*, has

been interrupted in the colonies in consequence of this sort of limited liberation conferred upon him in *England*. There has been no act nor ceremony of manumission, nor any act whatever that could even formally destroy those various powers of property which the owner possessed over his slave by the most solemn assurances of law, such as pledging him, or selling him for the payment of the owner's debts, or making any other use of him that the law warranted. Such rights could not be extinguished by mere silence, or by this country's declining to act in such a conveyance. There is nothing that marks a liberation from slavery; he goes back to a place where slavery awaits him, and where experience has taught him that slavery is not to be avoided. Slaves have come into this island, and passed out of it in returning to the colonies in the same character of slaves, whatever might be the intermediate character which they possessed in *England*, and this without any interruption, or without any doubt belonging to their character in that servile state: they go back with a perfect knowledge of the state which they are to re-enter.

The entire change of the legal character of individuals produced by the change of local situation, is far from being a novelty in the law. A residence in a new country often introduces a change of legal condition, which imposes rights and obligations totally inconsistent with the former rights and obligations of the same persons. Persons, bound by particular contracts which restrain their liberty, debtors, apprentices, and others, lose their character and condition for the time when they reside in another country, and are entitled as per-

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sons totally free, though they return to their original servitude and obligations upon coming back to the country they had quitted; and even in the case of slavery, slaves themselves possess rights and privileges in one character which they are not entitled to in another. The domestic slave may, in that character, by law accompany his master or mistress to any part of the world, but that privilege exists no longer than his character of domestic slave attaches to him; for should the owner deprive him of the character of being a domestic slave by employing him as a field slave, he would be deprived of the right of accompanying his master out of the colony. On the present question, however, I cannot but think that if the sovereign state has looked upon the manner in which the law has been understood and exercised in a subject-country, without interposing in any manner to prevent it, it has been in fact more criminal, if the case is to be so considered, than the subject-country which has followed the unprohibited practice. And what excuse is to be offered for Lord *Mansfield*, who long survived the change of law he had made, and yet never interposed in the slightest manner to correct the total misapprehension, if it is so to be considered, of the law which he himself had introduced?

It has been said that, in the decline of the ancient villenage, it became a maxim of very popular and legal use, "Once free for an hour, free for ever!"* and this has been applied as a maxim

* "Herein," says Lord *Coke*, "the common law differeth from the civil law; for *Libertinum ingratum, leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant, gratum et ingratum.*"—1 Inst. lib. ii. § 204.

that ought to govern in the case of negro slavery. Now, if this negro slavery was an exact transcript of the ancient villenage, it might not be improperly so contended; but it is to be observed, that this was a maxim introduced when the system of villenage itself was in a state bordering upon decay and growing into general abhorrence and contempt, and that it soon afterwards expired. It is to be noticed likewise, that this system of villenage was confined to this kingdom, though other countries had customs and usages of a similar nature. It was no part of a system extending into foreign countries, or transmarine possessions. Villenage did not travel out of the country, it did not affect the stability of any law which this country could consider as peculiar to its foreign possessions, and it has never been once applied, since the case of *Sommersett*, to overrule the authority of the transmarine law. This cry of "Once free for an hour, free for ever!" it is to be observed, is mentioned as a peculiar cry of Englishmen as against those two species of slavery. It could interest none but the people of this country: and of these only the masters, for no one else had any interest in the duty or services of their villeins. This cry has not, as far as we know, attended the state of slavery in any other country, though that has been a state so prevalent in every other part of the world, and has existed at all times.

The public inconvenience that might follow from an established opinion that negroes became totally free in consequence of a voyage to *England*, without any express act that declared them to be so, is not altogether to be overlooked. It is by no means improbable that, with such a temptation

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presented to them, many slaves might be induced to try the success of various combinations to procure a conveyance to *England* for such purpose; and, by returning to the colony in their newly-acquired state of freedom, if permitted, might establish a numerous population of free persons, not only extremely burthensome to the colony, but, from their sudden transition from slavery to freedom, highly dangerous to its peace and security.

It may now be of use to consider what has been the effect of other cases, very few of which occur, of any great affinity with the case of *Sommersett*. There is a case which happened in the Court of Chancery in 1762, under Lord Chancellor *Northington* (which was before the determination of Lord *Mansfield*), I mean the case of *Shanley v. Harvey*.* A bill was filed by *Edward Shanley*, as administrator of *Margaret Hamilton*, deceased, against *Joseph Harvey*, a negro, and two persons of the names of *Gossrap* and *Thorpe*, his trustees, for an account of part of the personal estate of the deceased. It happened that *Shanley* had, twelve years before, brought over this slave to this country, he being then only eight or nine years old, and presented him to his niece, *Margaret Hamilton*, who had him baptized, and changed his name; and on the 9th *July* 1752, she, being very ill, about an hour before her death, directed *Harvey* to take out a purse which was in her dressing-case-drawer, and delivered it to him: saying, "Here, take this; there is 700*l.* or 800*l.* for you, in bank-notes, and some more in money, but I cannot

* 2 *Eden*, 126.

directly tell what; but it is all for you, to make you happy. Make haste, put it in your pocket." He then knelt down and thanked her. She said, "God bless you, make a good use of it." The Lord Chancellor *Northington*, in dismissing the bill, with costs, said that, "as soon as a man sets foot on *English* ground he is free."

It must be observed, that this is the first time, probably, that this doctrine was so broadly stated in an English Court, and, perhaps, a little prematurely; but, it must likewise be observed, that his lordship here mentions only two effects of it; for he adds, "A Negro may maintain an action against his master for ill usage, and may have a *habeas corpus* if restrained of his liberty." This is an instance in which the law of *England* differed most essentially from the law of the slave code in the *West India* Colonies; for there, every acquisition by the slave, whether by legacy or otherwise, went to the master; but not so here, where the law of *England* adjudged it to the slave. And the Lord Chancellor enumerates another difference; which is, that the law of *England* empowered the slave to bring an action against his master for ill treatment. Both of these are direct contradictions to the rules of the slave code; but nobody could infer from thence that the whole of the slave code was, by that decision, intended to be vacated in the colonies on that account. The error of the opinion seems to be, that, because the slave code was overruled in *England*, where the law of *England* differed from it, it was therefore abrogated in the colonies *in toto*. The slave continues a slave, though the law of *England* relieves him in those respects from the rigours of that code while he is in

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By the slave code, every acquisition by the slave is an acquisition to his master.

By a residence in *England*, the slave-code is suspended, not extinguished.

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England; and that is all that it does. With respect to other severities which it refuses to inflict, it is *spinis de pluribus una*, which does not at all dislodge the other severities of that code, all of which he may avoid by continuing in this country. And it is a most remarkable circumstance, that though this case had been pressed upon the attention of Lord *Mansfield* in one of the speeches addressed to him, he himself never took any notice of it, although evidently, at that time, anxious to support his new doctrine, and struggling hard to call in aid every authority that could establish it.

Scotland and *Ireland* have the same privilege as *England*, being members of the same confederation; and the *Scotch* Judges have well expressed their opinions of the extent of the judgment of Lord *Mansfield* in the case of *Knight v. Wedderburn* * in 1778, a case argued with great ability; in which they determined the extent of this judgment to be, that the dominion assumed over the negro, by the law of *Jamaica*, could not be supported in this country. What does this prove, but the well-known fact, that different countries have different laws upon the same subject; and even different provinces of the same kingdom? It is a large chapter, and full of many difficult questions, that treats of such diversities, in the writings of civilians.

All that the Judges, in the different cases I have adverted to, have determined, is, that slaves coming into *England* are free there, and that they cannot be sent out of the country by any process to be there executed.

Slaves coming into *England* are free there, and cannot be sent out of the country by any process to be there executed.

* This case is cited from the "Dictionary of Decisions," vol. xxxiii. p. 545., *et seq.* in a note to *Sommersett's* case, p. 1.

I come now to consider the adjudged cases which have been adverted to, and there are very few which at all touch upon this point; and I cannot but think that the cases would have been much more numerous and more applicable, if the opinion had prevailed that the case of *Sommersett* had warranted a conclusion of the wide import that is contended for. The first case is that of *Keane v. Boycott* *, in the Court of King's Bench. In that case it appeared that a negro, whilst an infant, and in a state of slavery in the island of *St. Vincent*, executed a contract, by which he bound himself to his then master who was coming to *England*, to act as his servant for five years; and the action was brought for enticing the boy from the service of his master into the military service, which the boy accepted. An action was brought by the master against the officer who had enticed him; and it was determined that it was a good contract; voidable only at the instance of the boy, but not void, and therefore could not act as a defence to the action against the officer. But this has nothing to do with *slavery*, from which, of course, the boy was free from his arrival in *England*. It turns entirely upon the contract, and, therefore, in no manner touches the question.

The next case, in point of date, is the case of *Williams v. Brown*.† That was the case of a runaway negro slave who had come to *England*, and entered into a contract with the master of a vessel to serve as a seaman during a voyage to and from the *West Indies*. The ship was bound to *Grenada*,

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* 2 H. Bl. 511.

† 3 Bos. & Pull. 69.

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the very island from which the man had deserted, and where on the arrival of the vessel he was discovered by his master who claimed him as his slave, and who subsequently agreed with the captain of the vessel to sell his manumission for a price which the master of the vessel paid; whereupon the manumitted slave entered into a contract with such master to serve for three years. Upon his return to *England*, he sued the master of the vessel for his wages for the voyage, and had a verdict; but a rule *nisi* was obtained, and afterwards argued in the Court of Common Pleas. Mr. Serjt. *Shepherd*, who was counsel for the man, and was well known as a person who would never omit any plea that could be useful to his client, never urged the point, that, because the man had been in *England*, and was free *there*, he was consequently free at *Grenada*; and Mr. Justice *Heath* observed, that when the man "was claimed at *Grenada*, he was incapable of performing the service for which he now brings his action. He was liable," he says, "to severe punishment for having run away from his master: he was a slave for life." Mr. Justice *Rooke* said, "that though the man might enter into a contract to go to any other place but to *Grenada*, yet he could not engage to go there without danger of being detained;" and further, that, "being a runaway slave he became liable to punishment, and the forfeiture to his master in *Grenada* of all the wages which he had earned during the outward voyage; and that, being a slave in *Grenada*, he could not enter into any contract there without the leave of his master." Mr. Justice *Chambre* observed, that, "being claimed as a runaway slave, he was considered as a criminal;

he was liable to a very severe punishment: he was incapable of recovering, for his own benefit, the money which he had earned upon the outward-bound voyage." He adds, "that from the contract he could receive no benefit, for his master was entitled to all the wages he might earn." Lord *Aboanley*, who disagreed with the other judges as to the effect of the contract merely, but not upon the general question, stated, "The plaintiff, being as free as any of us while in *England*, engaged to serve the defendant who undertook to pay him a stipulated sum;" and adverting to the agreement entered into at *Grenada*, whereby he obtained his manumission, his lordship further stated, "that the man was thereby redeemed from slavery and the penal consequences attending his then situation;" and he proceeds thus: — "When the plaintiff was claimed in *Grenada* as a runaway slave, he was not only liable to be remanded into slavery, but by the laws of the island he was amenable to severe punishment."

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The man, then, was clearly entitled to his freedom when he first engaged into the service of the ship in *London*, although a runaway: at least, if there be any truth in these expressions, "that as soon as a man sets his foot in *England* — if he breathes the air of *England* — he is free without any further ceremony;" and it cannot be denied to him, although a runaway, as observed by Lord *Aboanley*, that this runaway was as free as any of us in *England*. But it appears that this runaway negro was, to preserve his freedom in *Grenada*, under the necessity of obtaining a manumission there; and he subsequently enjoyed his freedom in consequence of that ceremony; or, as that manu-

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mission implies, he must have remained a slave in *Grenada* without it. It is a clear recognition of the necessity of a manumission in that country, notwithstanding he had been in *England*, and the judges were all concordant in that particular; though Lord *Alvanley* expressed some doubts as to the validity of the contract upon other grounds. I think that this case bears directly upon the point, and is a direct recognition of the principle contended for, that a slave who returns to his country returns to a state of slavery. It is not to be said that the man's desertion is alleged as the cause of his return to slavery: he had become a free man by landing in *England*, in the opinion of all the Judges; and it is only by virtue of his pre-existing state of slavery, that he became subject to be returned into it again, until his manumission. The four Judges all concur in this — that he was a slave in *Grenada*, though a freeman in *England*; and he would have continued a freeman in all other parts of the world excepting *Grenada*.

I have been the more particular in stating this case, because I do think it approaches so near as to possess the authority of a direct decision upon the immediate subject, although I have heard the case sometimes quoted as almost amounting to a direct recognition of the freedom of the slave, on account of his having been in *England*; when nothing can be more clear than that it is, in every respect, a direct decision of the four Judges to the contrary.

The case of "*Forbes v. Cochrane and Cockburn*,"* seems to me to tend, though perhaps not

* 2 B. & C. 448.

so directly, towards the same conclusion. This case happened in consequence of the flight of a number of slaves belonging to Mr. *Forbes*, a subject of *East Florida*, on board one of his Majesty's ships of war, commanded by Sir *George Cockburn*, acting under the command of Admiral *Cochrane*. These slaves were reclaimed by Mr. *Forbes*, who insisted upon Sir *George Cockburn*'s sending them back. Sir *George Cockburn* declined this: saying, "that they had taken refuge on board of an *English* man of war, and that they were free from any constraint of his, although he had no objection if Mr. *Forbes* could prevail upon them to return; but having received them into his ship he could not direct them to be turned out:" and that defence was sustained by the Court of King's Bench. In truth, this is no more than a decision of that Court respecting the privilege claimed by ships of war of sharing in the rights and immunities of their own country. It was likewise decided, that if any attempt had been made, by force, to take the men out of that station and any mischief had happened thereon, the parties guilty of making that attempt would have been liable to a prosecution under the law of *England*.

Reference has been made to a local act passed by the people of *Antigua* themselves in the year 1816*, to the effect that "if any person claiming to be free, should be committed as a runaway, or supposed runaway slave, and it shall appear to the

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* Intituled. "An Act for altering and amending an Act for the better government of slaves and free negroes, dated the 28th of June, 1702." — See *Laws of Antigua*, vol. iii. No. 664. § 3. 4to. edit. *London*.

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Justices that he or she is legally free, or in equity or conscience ought to be considered as free, or hath been generally deemed or considered for any length of time a free person, the Justices shall by their warrant direct such person to be immediately discharged out of custody."

The first of these, that of being "legally free," is clearly inapplicable to this case, upon the grounds which I have stated on the general question; and I think the second, that of being "in equity or conscience"* considered free, cannot be applicable to slaves coming from *England*, to whose condition such privilege has been universally denied upon this plain ground, that a residence in *England* as a free-man had never been held to answer this description. It is what at all times, and at the present time, has been powerfully resisted. The temporary freedom thus acquired has ever been superseded upon the return of the slave; and slaves never have been deemed and considered as free persons on their return to *Antigua*, or the other colonies.

Those who contend for this interpretation of the law, as giving freedom to slaves merely because they have been in *England*, are bound to show, that ever since the local act persons returning from *England* have been allowed freedom upon their return, where not objected to on the part of the slaves themselves. It never could have been intended by this law to have given freedom to persons claiming it in consequence of their coming from *England*; for *that*, as I have observed, has been uniformly resisted by the people of *Antigua*. And

* On questions of "Law and Conscience" respecting villeins, see Doctor and Student, Dial. ii. c. 18, 19.

it is a known and universal rule in the interpretation of laws, that that sense is to be put on those laws which is the sense affixed to them by the legislature. They cannot, therefore, be considered as having ever answered the description contained in this legislative enactment; and I understand that it is the constant practice of persons, who intend giving freedom to slaves on their return to the colonies, to execute instruments of manumission previous to their quitting this country for the colonies.

A similar objection lies against the third. It is obvious that this cannot apply to slaves who have returned from *England*, but to those who might for a time have acquired a nominal freedom by rambling in the colonies under a character of freedom, real or pretended, and if shown to be clearly founded in error, it could not lead to a consequence of freedom. If persons have been rambling about the country under a false character, and that pretension is disproved, they can no longer obtain the benefits which are assigned to it.

Reference has also been made to another act which had passed previously, and said to form part of the local law of that colony, in which it is declared that they acknowledge no other law than the common law of *England*, so far as it stands unaltered by any written law of that island, or by some Act of Parliament. *

* The Act of Assembly referred to in the text, was passed in 1705, "for preventing tedious and chargeable lawsuits, and for establishing a constant and certain uniformity in the proceedings of the courts of the several islands under this government." It will be sufficient to cite the following section:—

"We, Your Majesty's most dutiful and loyal subjects, the Commander-in-Chief of Your Majesty's *Leeward Caribbee*

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Now this enumeration of their laws omitted a very material source from whence other laws were derived — that of legitimate custom ; and if even that should not be deemed a venial omission, it surely would be a gross abuse of all principle to say, that upon that account they should be deprived of their commerce, which every other island in that archipelago had uniformly possessed, and which the Sovereign State had promoted and encouraged in all of them. It might not have occurred to the gentlemen of that island to insist upon custom, so protected, to be a source of laws ; and an omission of this kind, in describing the sources of law, can never have the effect of disabling that efficacy which has not only been exercised both before and since the framing of that decree, but has been guaranteed and protected, to the utmost, by the laws of the mother country, in common with the state of the other islands in the same part of the world.

Having adverted to most of the objections that arise to the revival of slavery in the colonies, I have first to observe, that it returns upon the slave by

The common law of *England* to be in force, except where altered by laws of the islands :

Pretended customs to the contrary void.

Islands, the General Council, and General Assembly of the said Islands, now met at *Nevis*, do humbly pray Your Majesty, that it may be declared, and it is hereby declared by the authority aforesaid, that the Common Law of *England*, as far as it stands unaltered by any written laws of these islands, or some of them, confirmed by Your Majesty, or some of your royal predecessors in council, or by some Act or Acts of Parliament of the kingdom of *England*, extending to these islands, is in force in each of these Your Majesty's *Leeward Caribbee Islands*, and is the certain rule whereby the rights and properties of Your Majesty's good subjects inhabiting these islands are and ought to be determined ; and that all customs or pretended customs, or usages contradictory thereunto are illegal, null, and void." See Laws of *Antigua*, No. 31.

the same title by which it grew up originally. It never was in *Antigua* the creature of law, but of that *custom* which operates with the force of law; and when it is cried out that *malus usus abolendus est*, it is first to be proved, that, even in the consideration of *England*, the use of slavery is considered as a *malus usus* in the colonies. Is that a *malus usus* which the court of the King's Privy Council and the courts of Chancery are every day carrying into full effect in all considerations of property, in the one by appeal, and in the other by original causes; and all this enjoined and confirmed by statutes? Still less is it to be considered a *malus usus* in the colonies themselves, where it has been incorporated into full life and establishment; where it is the system of the state and of every individual in it; and fifty years have passed without any authorized condemnation of it in *England* as a *malus usus* in the colonies. The fact is, that in *England*, where villenage of both sorts went into total decay, we had communication with no other country; and, therefore, it is triumphantly declared, as I have before observed, "once a freeman ever a freeman," there being no other country with which we had immediate connection, in which, at the time of suppressing that system, we had any occasion to trouble ourselves about. But slavery was a very favoured introduction into the colonies: it was deemed a great source of the mercantile interest of the country; and was, on that account, largely considered by the mother country as a great source of its wealth and strength. Treaties were made on that account and the colonies compelled to submit to those treaties by the

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Slavery in the colonies is not the creature of law but of custom, to which the maxim, *malus usus abolendus est*, is not applicable.

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authority of this country.* This system continued entire. Instead of being condemned as *malus usus*, it was regarded as a most eminent source of its riches and power. It was at a late period of the last century that it was condemned in *England* as an institution not fit to exist here, for reasons peculiar to our own condition; but it has been continued in our colonies favoured and supported by our own courts, which have liberally imparted to it their protection and encouragement. To such a system, whilst it is so supported, I rather feel it to be too strong to apply the maxim, *malus usus abolendus est*. The time may come when this institution may fall in the colonies, as other institutions have done in other flourishing countries; but I am of opinion that it can only be effected at the joint expense of both countries; for it is in a peculiar manner the crime of this country; and I rather feel it to be an objection to this species of emancipation, that it is intended to be a very cheap measure here by throwing the whole expense upon the colony.

It has been said that the law of *England* discourages slavery, and so it certainly does within the limits of these islands; but the law uses a very different language and exerts a very different force

The law of *England* discourages slavery within the limits of these islands, but gives to it an almost unbounded protection in its colonies.

* By the treaty of *Utrecht*, the *Assiento*, a contract by which the royal *Guinea* company settled in France had undertaken to supply the *Spaniards* with negroes at a concerted price, was transferred to the *English*; and a new instrument was signed in *May* 1713, to last thirty years, by which this country bound herself to send 4800 negroes yearly to *Spanish America*. The *Assiento* consists of forty-two articles; it is printed in the third volume (p. 375.) of a "Collection of Treaties of Peace and Commerce." 4 vols. 8vo. Lond. 1732.

when it looks to her colonies; for to this trade in those colonies it gives an almost unbounded protection, and it is in the habit of doing so at the present time in many exercises of public authority; and even since slavery has become odious in *England*, it has been fully supported by the authority of many statutes for the purpose of carrying it into full effect in the colonies. All the efforts of the persons who have contended for the abolition of slavery in the colonies, and who have obtained many acts of parliament for the regulation of it therein, have in no degree weakened the force of those *English* statutes which so powerfully support it in the mother-country.

It has been observed, that the sovereign state has declared, that all laws made in the colonies, contradicting its own law, shall be null and void, and cannot be put in execution*; but is that the character of the laws in the colonies for the encouragement of the proprietors of slaves? Has it not, since the declaration of its judgment against slavery, declared, in the most explicit and authentic manner, its encouragement of slavery in its colonial establishments? Have not innumerable acts passed which regulate the condition of slaves, and which tend to consider them, as the colonists themselves do, as *res positæ in commercio*, as mere goods and chattels, as subject to mortgages, as constituting part of the value of estates, as liable to be taken in execution for debt — to be publicly sold for such purposes †; and has it not established

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The statute law of this country looks on slaves in the colonies as mere goods and chattels, as subject to mortgages, &c. and has established courts of the highest jurisdiction for carrying such provisions into execution.

* See 7 & 8 *W. 3. c. 22. § 9.*, and *Black. Com. p. 107. et seq. Coleridge's edition.*

† See 9 & 10 *W. 3. c. 26. 5 G. 2. c. 7. 23 G. 2. c. 31. 59 G. 3. c. 120.*

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courts of the highest jurisdiction for the carrying into execution provisions for all these purposes; and these its most eminent courts of justice—its court of the King's Privy Council, and its courts of chancery, where all these regulations are carried into effect with most scrupulous attention and under the authority of acts of parliament? Can any man doubt that at this time of day slaves in the colonies may be transferred by sale made in *England*, and which would be affirmed without reference to the Court so empowered; for the acts of Parliament, including the recent Consolidation Act *, prescribe and regulate the manner in which these transfers of slaves are to be securely made in this kingdom, and the mode to be adopted where money is lent on mortgage upon the security of slaves; and how, under the guarantee of such protection, can it be asserted that the law of *England* does not support, and in a high degree favour, the law of slavery in its *West India* colonies, however it may discourage it in the mother country? Is it not most certain that this trade of the colonies has been the very favourite trade of this country, and so continues, so far as can be judged from encouragement given in various forms—the making of treaties, the institution of trading companies, the devolution of property from one company to another, the compulsion of the colonies to accept this traffic, and the recognition of it in a great variety of its laws? If it be a sin, it is a sin in which this country has had its full share of the guilt, and ought to bear its proportion

* 5 G. 4. c. 113. § 37.

of the redemption. How this country can decline to perform the act of justice, in performing the act of charity, men of great wisdom and integrity have not been able to discover.

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The example of *France* has been glanced at, which has adopted a more decided policy with regard to its colonial slaves. It certainly discouraged the entry of slaves into *France*, not permitting it, according to the first edict passed in 1716*, but by the permission of the governor or commandant of the colony; and that edict commands the slaves to return to the colonies at the instance of the master. But, in the event of the master not having obtained permission for the slave to go to the mother country, in that case he was declared to be free. *France* did not, therefore, do as this country had done, put their liberty, as it were, into a sort of parenthesis; but it denied them freedom in *France*, and held them bound to their masters, if the regulations of the edict had been complied with by them. In 1738, an alteration took place by a further edict, whereby, if the regulations had not been attended to, the slave was not, as before, entitled to his freedom, but he became forfeited to the crown, to be sent back to be employed in the public works of the colonies. Whether that is the footing upon which the ques-

* This edict is annexed to *Boucaut's case*, which, under the title of "La Liberté réclamée par un Nègre," is printed in *Les Causes Célèbres*, vol. xiii. p. 526—647. (*Paris*, 1739.) The edict formed part of the "Code Noir" of *France*, and extracts from it are appended to *Sommersett's case*. See *Howell's State Trials*, vol. xx. p. 12—15. For the edict of 1738, see *Commerce de l'Amérique*, tom. ii. p. 235.

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tion now stands, I am not informed, and do not feel it to be of importance in determining the present case. I believe *France* has been more zealous in christianising her slaves than we have *formerly* been; although this deficiency on our part has been most happily supplied by the mission of two most respectable prelates to superintend the spiritual concerns of these islands.*

England, the general sovereign of all her colonies, has been looking on with indifference and permitting daily occurrences to pass under her eyes without taking any steps whatever to correct them; and, with all the indulgence which has been shown to the efforts of gentlemen who have manifested a zeal for the emancipation of slaves, the system of law has been little relaxed. Our own domestic policy continues to be actively employed, in supporting the rights of proprietors over the persons committed to their authority in the character of slaves.

It cannot be denied that cases have been mentioned by *Dr. Lushington*, I know not to what extent they prevail; but in any extent they are cases which must excite the sympathy of every considerate man, and call for remedy to be administered by the mother-country, if it is not supplied by the colony itself. That persons, brought up with the expectation of considerable wealth, acquired in this or other countries, should be subjected to the reverses of fortune which may befall them, upon visiting the country of their parents at an advanced period of life, is a most severe hard-

* See 6 *Geo. 4. c. 38.* amended by 7 *Geo. 4. c. 7.*

ship ; that they should be compelled to submit to the humiliation which may attend them in any acquired situations, upon such return, is to be much lamented ; but these are matters happily within the power, and certainly within the justice, of Parliament to remedy by some general correctives. Lord *Mansfield*, I observe, recommended to the merchants to make application to Parliament for any purposes which they might deem requisite on the subject. It cannot, I think, be denied, that there are purposes for which such an application might be deemed eminently useful. Cases in which the representatives of families, who have acquired property in *England* or elsewhere, and who have returned at a very mature age to those islands, are certainly very fit objects to be relieved from a state of interminable slavery ; for a return to a condition of slavery must operate upon them and others, who are at all under similar circumstances, with an unjust severity ; and, at any rate, the humanity of Parliament could not be employed to a more beneficent effect, if the colonists themselves should neglect to interfere.

I am very sensible that there are many great and important questions, touching our empire in that part of the world, much connected with the questions which I have ventured to examine, and which lie beyond the power of any consideration of my own, or perhaps of those gentlemen who have adverted to the same subjects, but with a result which I am compelled to oppose. How far, for instance, a law can be deemed legal and constitutional which authorizes a Custom House officer to seize a person described to such officer as a free person, and to inflict upon him the degrading

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process which that law compels him to use in respect to slaves, are questions that exceed the competency of my powers, and, possibly, even of those who have framed regulations upon these important subjects. There are also other points deserving of attention. It is known that there are estates abounding with slaves, which are in mortgage by special contracts to residents in this country, commonly *English* merchants, parties who can bring as many of these slaves as they think fit over to *England*, and by that means rid themselves of the security which they had given to the mortgagees. These, and many other questions deeply affecting the value of *West India* estates to persons in *England*, as well as in the colonies, are questions of very serious import, and entitled to the attentive consideration of the legislature.

These are the conclusions to which I have arrived, after a very full and mature consideration of the subject. I can truly say, that I arrived at those conclusions with a mind free from any prepossession upon the subject, and with the determination to attend to nothing but the fair result of the evidence which applies to it. I am sensible that other opinions may be formed upon the question; but, in affirming the sentence of the Judge of the Court below, I am conscious only of following that result which the facts not only authorise but compel me to adopt.

Sentence affirmed, with costs.

May 6th,
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Note. — The provisions of the 5 G. 4. c. 113. s. 34. (in respect to slaves restored upon appeal), having been complied with, the Court, in order that the claimant might obtain the costs and damages decreed at *Antigua*, remitted the cause.

OSIRIS. SHAKEN.

December 13th,
1827.

THIS was an appeal by the salvors from an award of 100*l.* given by three magistrates at *Penzance* for services to the *Dutch* ship *Osiris*. In addition to the evidence before the magistrates, the appellants introduced ten affidavits. The value of the ship and cargo was 3700*l.*

On an appeal from an award of magistrates in a case of salvage, the Court declined to admit further affidavits and confirmed the award.

Dodson and *Addams* for the owners. These new affidavits cannot be received: and the reward is quite ample.

Lushington contra. The salvors state that the magistrates declined to receive further evidence. Even the facts admitted before them entitle the salvors to a larger reward.

COURT. The whole evidence should have been produced before the magistrates. It would seem as if the salvors waited till this foreign ship was out of the way. I should be very reluctant to hear an appeal of this sort upon evidence not before the original tribunal; for how could this Court censure magistrates upon affidavits of which they knew nothing? I see no reason to disturb the award; but I shall not give costs.

Award confirmed.

December 13th,
1827.

WILLIAM MONEY. JACKSON.

A seaman who had elected to take at Calcutta a bill of exchange on the owners, instead of cash, in payment of wages, cannot sue the ship, on payment of such bill being refused, the owners having become bankrupts.

THIS was a suit for wages brought by *William Moakes*, late second mate of the above ship. The petition alleged, "that the ship's agents at *Calcutta* paid him his wages partly in cash, and partly by a bill of exchange upon the *London* owners, who had refused payment, and were bankrupts." A responsive plea alleged, "that the mate was tendered his full wages in cash; but that being desirous to remit money to *England*, the agents, at his request, gave him a bill for 40*l.*, payable, six months after sight, on the owners in *London*."

Lushington, for the mariner, opposed the allegation. It is not disputed that 40*l.* are still due for these wages: but the question is as to the mode of payment, — whether *Moakes* can sue the ship, or whether he must prove under the commission of the owners' estate? The agents are also bankrupts. If *Moakes* had chosen to take a bill of exchange on a firm not connected with the ship, it might be argued that he had preferred other security, and had quitted his remedy against the ship and her owners; but here the bill was drawn upon the owners themselves by their own agents.

Dodson contra.

COURT. It is pleaded that this man might have taken his wages in money at *Calcutta*; but instead of the money he preferred a bill of exchange as an accommodation to himself: he then made his election, and must stand by the risk. I admit the allegation.

DUNDEE. HOLMES. *

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THIS was originally a cause of collision. The owner of the *Dundee*, after a sentence against him in the Court of Admiralty upon the extent of his liability under the 53 *Geo. 3. c. 159.* applied for a writ of prohibition; but the Court of King's Bench refusing to interfere in that summary way, directed the plaintiff to declare, and ultimately gave judgment for the defendant. † A writ of consultation was thereupon brought into this Court on the 14th of *May 1827.* ‡ The subsequent proceedings are detailed in the report of the registrar and merchants upon matters referred to them by the Court: viz. — That on the 28th of *January 1823*, the report of the registrar and merchants, dated on the 7th of *May 1822*, and decreeing to *Laurie and Co.*, the owners of the *Princess Charlotte*, the parties promoting this suit, 455*l.* 12*s.* 6*d.*, including therein 350*l.* for interest, with further interest from the date of the report till payment, and also exclusive of the proctor's bill of costs not then produced and taxed, was confirmed: That on the 12th of *June 1827*, the proctor's bill of costs, reported at 435*l.* 14*s.* 10*d.*

In a cause of collision where payment of a sum for damage, interest, and costs reported to be due, had been delayed by the party liable, the other party is entitled to interest on the whole sum from fifteen days after the date of such report, and stat. 53 G. 3. c. 159. s. 1. limiting the liability of owners to the value of the ship, appurtenances and freight applies only to the original claim for damage and extends not to costs and interest.

* See vol. i. 109. † *Gale v. Laurie*, 5 B. & C. 156.

‡ The material part of the writ was as follows: — It is considered by the Court of King's Bench, that the fishing stores on board the *Dundee* at the time of the loss and damage were part and parcel of the said ship's appurtenances and freight, according to the true intent and meaning of the 53 *Geo. 3. c. 159.*: and that the Admiralty Court may proceed in the suit.

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was, after argument of counsel, confirmed *; and the Judge referred back to the registrar and merchants the report of the damages sustained by the owners of the *Princess Charlotte*, to consider what further interest was due in addition to 455*l.* 12*s.* 6*d.* awarded to them under that report: accordingly the registrar now stated, that, in the opinion of the merchants and himself, a further sum of 930*l.* 7*s.* 6*d.* was due for interest from the 22d of *May* 1822 (being fifteen days after the date of such former report) until the 30th of *June* 1827, at four *per cent. per annum*; and also the sum of 26*l.* 16*s.* for interest on 120*l.* paid in advance for costs by the claimants to their proctor from the 24th day of *November* 1821 to the 30th day of *June* 1827; and 435*l.* 14*s.* 10*d.*, being the amount of the bill of costs, to which sums collectively was to be added further interest from the 30th of *June* 1827, together with any costs incurred since the taxation.

The value of ship's tackle, furniture, and fishing stores, was 4921*l.*: and the total sum thus reported to be due was 5947*l.* 10*s.* 10*d.*

Pickard, in opposition to the report, made three objections. 1st, That the effect of the report was to give compound interest — interest upon interest, inasmuch as the 930*l.* 7*s.* 6*d.*, allowed for interest on the amount of the former report, included interest upon the 350*l.* already given for that purpose

* On one side it was moved, that the proceeds having been in possession of the plaintiff in prohibition, the report should be referred back to adjust what further interest was due, and at what rate: and on the other side — that, the delay not being imputable to the plaintiff, no interest should be allowed pending the proceedings under the writ of prohibition.

upon the amount of damage sustained. 2d, That interest on a bill of costs was illegal ; and on this point he cited *Butler v. Burk*, 14 Viner, tit. Interest, (C) 9. 3d, That whatever might be the opinion of the Court upon the two first points, the whole amount was controlled by the 53 *Geo. 3. c. 159. s. 1.* under which statute the responsibility of the owner was limited, and could not exceed the agreed value.

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Arnold and Lushington contra.

One of the items in the former report is 350*l.* for interest : in the further report interest is allowed on the whole amount of the former report including that item : this is said to be compound interest, or interest upon interest which ought not to be allowed. And it is admitted that such ought not to be allowed in a common, ordinary, and current account : but when an account is settled, such interest as makes part of that account becomes principal, and, in a further account between the parties, interest is to be charged on that as on the other items. *That* interest is due at the settling of the account equally with the other items ; and the withholding of interest upon it would be equally a loss and detriment to the other party as withholding it on the other items. Such charge of interest is according to the usage of merchants. It is also the practice of the Court of Chancery. "Interest shall be allowed for the balance of a stated account, though interest is computed in the account." * And the practice of this Court agrees with it. In the *Driver*, 5 Rob. 145. the Court said : — "The usual rule un-

* 2 Com. Dig. tit. Chancery. Interest. (3. s. 3.)

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doubtedly is not to give interest on interest; but when interest has been given and the account is made up, the interest then becomes principal, on which it is not unreasonable that further interest may be decreed similar to what is done in the Court of Chancery."

The second objection is, that interest is allowed on money stated to be advanced by the proctor to his party. But this was money advanced and actually paid. If interest be not allowed on it, the party will suffer loss to the amount of the interest, as if he actually paid so much more money: he, therefore, is entitled to have this allowed as part of his costs and charges.

The third objection is to the amount of the report, which is 5947*l.* 10*s.* 10*d.*; and it is stated that by 53 *G. 3. c.* 159., no ship owner is liable for loss or damage done by his ship beyond the value of the ship, its appurtenances, and freight: the value, in this case, is 4921*l.*; therefore the party is not liable beyond this sum. But the answer is, that the claimant is entitled, under the statute, for compensation for his loss to the amount stated. He is also further entitled to such costs as he shall incur in recovering this compensation; and to interest, if payment be delayed: and the excess of the report, above the value alleged, consists of these items. First, as to costs, wherever compensation is due, the claimant is entitled to be reimbursed the costs of obtaining it, otherwise he will not obtain his full right; that will be diminished by the amount of the costs. Therefore, by the practice of this and of all other Courts, costs are given in such cases. The statute limits the amount of compensation. It does not enact that this shall

be taken in full for the loss, and also for the expenses of recovering against the wrongdoer ; this cannot be the meaning and intent of the statute ; it would be unjust, and lead to litigation and fraud ; it would allow one party to protract litigation at the costs of the other. Some clauses of the statute mention costs over and above the compensation for loss. It has provided, by the 7th section, that the ship-owner may file a bill in Chancery to restrain suits against him, then the value is to be brought into Court, and the Court may make order to complete the payment. And the 8th section enacts, that the Court may also direct security to be given for the costs of the suit. The 16th section provides that sums, paid for compensation, and for costs incurred, may be made matter of joint account between joint owners. If the ship-owner pay to the claimant the value according to the statute, without litigation, he is protected from further demand ; but if he oblige the claimant to incur costs and charges to recover this, he must pay those costs, or the claimant does not obtain the compensation which the law allows him. Secondly, as to interest. If payment be delayed, the claimant is entitled to interest, or he will suffer loss ; and this is a *new* loss, distinct from his original loss by the damages done, and not within the statute ; for the statute cannot mean that the ship-owner shall pay only the value of his ship, and be allowed to withhold payment of that, as long as he thinks fit, without interest ; this would be palpably unjust and absurd. If he pay the compensation allowed, when due, he is discharged ; but if he withhold payment, he, like all other debtors, is liable to interest. When under the

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statute the value is brought into chancery, by the 13th section all interest and profit made thereof shall be considered as belonging to the parties who shall appear entitled to the principal. The position on the part of the ship-owner claiming exemption from costs and interest amounts to this, that the one party may carry on a litigation at the expense of the other, and have the advantage of retaining the money to his own use and benefit, as long as he can protract it; and the present suit is an example of what may be expected if this could prevail. The value allowed by the statute would have nearly compensated the loss sustained, and the costs, when the account was first settled. The greater excess, now objected to, has arisen from the protraction of the case. Under these considerations, it is submitted that the further report, charging costs and interest, ought to be confirmed.

COURT. — I have no doubt upon this subject; but I wish to consider it a little further, and will communicate the grounds of my opinion. That opinion was expressed in the following terms.

JUDGMENT.

Lord *Stowell*. — The justice of this case lies entirely with the counsel who have argued on the part of those who have sustained the injury, and who apply for full restitution. It is objected, in the first place, that \$50*l.* is stated for interest; and that in the further report interest is allowed on the whole amount of the former report including that item. This, it is argued, is compound interest — interest upon interest, and ought not to be allowed. To which it is answered, with perfect justice, and conformity to the practice of all Courts, that where

interest is so settled it shall bear interest thereon, and that the same shall not be deemed a compound interest, charging the party with an unfair pressure in such account. It is agreeable to the practice of merchants, and agreeable to the practice of the Court of Chancery, and has been so held in this Court. Where interest is made up, it then becomes principal and bears interest as part of the principal.

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The next objection is that interest is ordered to be paid on the costs, which is unjust and ought not to be allowed; to which it is answered again, with perfect justice, that the costs to which the party is put are a part of his loss, and which would not be compensated unless these costs were allowed.

The third objection rests upon the stat. 53 G. 3. c. 159. s. 1. by which no ship-owner is liable for loss or damage done by his ship beyond the value of his ship, appurtenances, and freight. The value in this case is 4921*l.*; therefore the party is not liable beyond that sum. To which it is answered, that the sufferer is further entitled to such costs as he shall incur in recovering this value, and to interest if payment be delayed. And the excess of the report above the value stated consists of these items. The claimant is entitled to remuneration for the costs to which he is driven for recovering his loss; they certainly form a part of that loss, and the statute is not guilty of that injustice which would ensue if it excluded those costs that are necessary for replacing the sufferer in a just state of compensation. If the party is reinstated in the value of the property without litigation there is no demand for costs; but if he cannot obtain the benefit of the statute, in respect to compensation, without being driven to the ne-

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cessity of a suit, the statute would be chargeable with great injustice if it did not admit the payment of these costs, and accordingly they are mentioned in several parts of the statute. And it was justly remarked that if without payment of interest, the wrong doer could retain the money due to the sufferer, he might apply it to the purposes of an unjust and persevering litigation.

I sustain the report, and with costs.

MEMORANDA.

In the course of the *Christmas* vacation, Lord *Stowell* retired from the chair of the High Court of Admiralty, where he had presided since *Michaelmas* Term 1798. — He was succeeded by

Sir *Christopher Robinson*, Knight, the King's Advocate, who was sworn a member of His Majesty's most honorable Privy Council.

Herbert Jenner, LL.D., was appointed to the office of King's Advocate, and was knighted.

CATHERINE OF DOVER. DAVISON.

March 21st,
1828.

THIS was a cause of collision brought by the owners of the *Dart*, a *Deal* pilot-boat, run down by the *Catherine* while negotiating to pilot a *Hamburg* galliot. One of the crew of the *Dart* was drowned. The value of the boat was laid at 250*l*. When the pleadings were opened, *Addams*, for the *Dart*, objected to the evidence of *Sladen* and two other witnesses, on the general principle that persons having an interest were incompetent witnesses.* *Lagden v. Flack*, 2 Consistory Reports, 303.

In a cause of collision the crew of the ship, charged with committing the damage, admitted (on the ground of necessity, and that no other evidence could be expected) as witnesses, though, being sharers in the profits and losses of the vessel, they would not swear they were disinterested in the result.

The consideration of the objection was reserved till the evidence was about to be read, when after argument the Court observed: The interest is not direct; it is a resulting interest merely depending on the employment of the vessel. It is denied that the witnesses have any interest in the property; they may be liable to repairs and to other incidental

* *Richard Sladen*, on the 2d interrogatory, answered:—
“He is not an owner but a sharer in the profits and losses of the *Catherine of Dover*, to the amount of one seventh. His fellow witnesses have each a similar share. *William Davison*, the master of the said lugger, is the sole owner. Respondent cannot swear that he is wholly disinterested in the event of this suit, because he does believe that if *Davison* should lose this cause, he, the respondent, will be called upon to contribute one seventh part or share of what the loss may come to; but he looks upon it that he shall not be a gainer whoever may get the cause. Respondent became a sharer in the *Catherine* just after she was launched, but his share has not always been so much as at present.”

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expenses, though it does not appear that, as shareholders in the navigation of the vessel, they could be required to contribute to the reparation of this injury. A distinction is commonly recognized, that a witness is not, at law, incompetent merely on the ground of his believing himself interested. The Court, therefore, would require more authority than has yet been adduced, to convince it that the parties had such an interest in this suit as will render them incompetent.

But the ground of necessity is still stronger. Here was an occurrence at sea, in which one boat alleges a serious charge against another, on facts capable only of being spoken to by the respective crews; and could it be supposed that the Court would decree reparation against a party unheard, or upon the evidence alone of the adverse side? The interest also of the crew of the *Dart* is nearly as strong: they admit their habits of employment in that vessel, and their apprehension of a loss of wages till another boat can be procured. If the case had come before me on petition supported by affidavits, according to the usual form of such cases, each party would have told their own story. Cases of necessity are held to constitute an exception; as, in respect to freemen of corporations, where none but freemen know the facts, and yet may have an incidental interest in the question. On these grounds the Court directed the evidence to be read *de bene esse*, and intimated that it would, if required, hear a further argument on its admissibility.

The objections were renewed on the next session.

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The *King's Advocate* and *Addams*. — The ad-

mitted interest is clearly an interest in the result of the trial; although *Davison* is described as sole owner, there are shares in the profits and losses assigned to the mariners; and one share has been put aside to answer the costs of the suit. The witnesses will not swear they are not interested, as they expect that *Davison* will call upon them to contribute. *Amitié*, VILLENEUVE, 5 Robinson, 544.

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Phillimore contra. — The interest, if any, is uncertain and not sufficient to disqualify. In cases of this description witnesses are admitted in the Court of Admiralty from necessity.

JUDGMENT.

Sir *Christopher Robinson*. — It is not my intention to leave the parties who have taken the present objection in doubt as to the decision of the Court on this point, as it is due to them that they may know on what grounds to seek their remedy in the superior Court, in case they shall be advised to appeal. If the judgment of the Court depended only on a construction of the interest imputable to the witnesses under their own account of the agreement which subsists with the master, and of their own belief, it might be less satisfactory; as it would amount only to this, that the Court does not think the interest to be so clear, as has been contended; and that in a case of doubt, it would be disposed to admit the evidence rather than to exclude it. There is certainly no direct interest of ownership; and it is probable that if the witnesses had been interrogated accurately as to their agreement, it would have come out that the engagement for profit, loss of repairs, and incidental expenses, did not include a responsi-

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bility for consequences, like this of imputed misconduct charged against the owner.

The distinction as to belief of legal interest, and interest in bounty, is not very satisfactory, as it may be in the power of the courts, on proper interrogatories, to remove any erroneous impression of legal interest, and to direct the persuasion of the witness rightly on that point: whereas the reliance on bounty merely is not capable of being so counteracted. It is, however, on the principle of necessity (which has been always admitted to form an exception to the objection of interest), that the Court rests its judgment. Objections to competency on the ground of interest are sustained in order that evidence may be obtained free from bias; but if, to effect this, a Court excludes the only proof that can be offered by the defendants, the principle is destroyed, by transferring the bias to the other side, and by hearing the case on *ex parte* evidence alone.

In this case, the acts and words of the crew of the *Catherine* are brought forward by the *Dart* to support the charge of wilful or negligent conduct: it is impossible to estimate this evidence without allowing the only men that were on board the *Catherine* to speak in their own defence. The accident happened on the 1st of *March*, and the action was not instituted till the 30th. The *Galliot* had left this country; so that no witness could be produced from that vessel. It is, then, under these peculiar circumstances that I think it essential to the purposes of justice that these witnesses should not be excluded.

If evidence had been, or could have been, produced from the *Galliot*, on one side or on the

other, I certainly should not have admitted witnesses liable to this objection of interest. But the necessity of the case justifies the exception; and this is the ground of my judgment. That ground of exception is recognized in all books. Mr. Justice *Buller* in his *Nisi Prius* * states it, "as the third exception under the general rule, that a party interested will be admitted where no other evidence is reasonably to be expected;" and he cites a manuscript case very similar to the present. It is an authority directly in point; and I think myself bound to act upon it by receiving the depositions of these persons. †

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* Page 289.

† The Editor has been favoured, upon this subject, with two cases from the notes of Dr. Arnold.

THE PITT:

This was a petition to dismiss two parties, who were plaintiffs, under the general description "of crew of the ship," in order to produce them as witnesses. They had given in their answers, and had executed releases of their claim to any share of salvage.

Sir *William Scott*. An indulgence is given, in such cases, from necessity, as the only evidence can arise from salvors or the persons saved, — both in some measure parties. The rules of evidence are, here, necessarily lax, though the witnesses are open to observation on their credit; and I see no objection, but that it may weaken the security of the other party for costs. It is usual to dismiss defendants; but it is not so usual as to the plaintiffs, though it is sometimes done. The principle is that justice may be effected, and the truth of the facts laid before the Court. No objection can arise on the ground of interest, for the parties have released.

Dr. *Swabey*, on the same side. These parties are as competent as a legatee who has released. It may be doubted, whether they might not, on a release, be witnesses without a dismissal.

May 26th,
1791.

In a cause of salvage, two persons, plaintiffs as part of "the crew of the ship," on signing releases dismissed to be examined as witnesses.

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The case was then argued on the merits ; after which the Court addressed the Trinity Masters to the following effect : —

In joint capture every sailor on board is a competent witness ; and, in those cases, the men are as much interested and as much parties as in these ; but, on release, no objection is ever taken to such testimony. If a suit were in the names of a master and crew of one ship, against the master and crew of another, *the crew* might be examined. Testamentary cases are brought in the name of the executors ; where their testimony is wanted, on renunciation, it is admitted : so frequently this occurs that I do not remember it to have been argued in opposition. *Berry v. Staples* is a recent case, in which a co-executor — the writer of the will — prayed to be dismissed upon an affidavit that he would be a material witness. The question gave rise to no argument, for the opposition was dropped. In 1765, *Cawood v. Badger* : will opposed by next of kin : proxy of three executors propounding it : after which one renounced, and prayed to be dismissed as a necessary witness. This was opposed by the next of kin, because, if dismissed, the sentence would not bind him. To this it was answered by Dr. *Wynne*, and sustained by the Court, that such executor would be bound, if the proctor took out a decree against him to appear. (a) And in that case the Court quoted *Beaumont v. Sharp*, Delegates, 1752, where it was held that a party, though voluntarily so, might be dismissed in aid of justice on a mere averment that he was a necessary witness to support a will. There was, in that case, no affidavit ; the only question was if the party was a necessary witness : and he was dismissed in order to become a witness. In maritime causes the strict rules of testimony are relaxed.

Dr. *Nicholl* contra. The parties are interested as to costs. No security is given to answer such interest, and to exonerate them. The owners have a right to their answers, by which they may furnish evidence against themselves. In all the cases cited the parties were necessary witnesses. I can furnish an additional case. In *Godfrey v. Petit*, a legatee had intervened for his interest. On an affidavit that the evidence of the legatee

(a) See *Wood v. Medley*, 1 Haggard, Eccl. Rep. 645. 482.

It is now, Gentlemen, my duty to premise briefly some few observations on the point to which your

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was necessary to prove a fact, he was dismissed and made a competent witness. Here no necessity is shown but by the affidavit of a fishmonger. How does he know what "necessary" means? It will be dangerous to examine these parties as witnesses, being well acquainted with their own case. There may have been passengers on board, then no necessity can exist. The single ground for dismissal, where it has been done, has been that such parties were the only witnesses to the facts wanted to be proved.

Dr. *Laurence* on the same side. The point on which a necessity is grounded, has been specifically alleged in all the cited cases. In the *Sara Barnardina* the parties were admitted as witnesses, without dismission.

In reply. The word "necessary" is not a technical word; it is open to the understanding of any one: it means a witness without whose testimony material facts cannot be proved. If the other side cannot have answers, they can administer interrogatories: we are willing to undertake for costs.

Per CURIAM (Sir *James Marriott*).

The affidavit of the fishmonger is only as to his belief: it is no more than the allegation of a proctor in the cause; and I lay it out of my consideration. Then the question is, whether the examination of these parties is materially necessary? Cases have been quoted to show that persons interested may be examined; and they may be, in many cases, *ex necessitate rei*. In prize cases, the captured are examined. In *France* the examination of the captors also takes place. The Court always endeavours to exclude biassed witnesses; but it must sometimes admit them: the Court is to judge of the necessity. There will be no hazard in admitting this testimony to be received.

SARA BARNARDINA.

This was a suit for salvage. The vessel was going on a voyage in the whale fishery, and had anchored, in danger, on the coast of *Norfolk*, when, upon a signal of distress, the *Pitt*, with *Lash*, the master, and six others on board, went out to her assistance. The master, mate, and some of the foremast men

June 8th,
1790.

In a cause of salvage, by plea and proof, interested witnesses admitted on the ground that they were the only witnesses.

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judgment should be directed. It is a case in which a pilot boat is alleged to have been run down by

of the *Pitt*, had been examined : it was admitted they were on board.

Dr. *Nicholl* and Dr. *Laurence* for the owners.

Here is no competent evidence — every one of the witnesses is a party, and has an immediate interest in the cause. The warrant was taken out in their names, and the suit has been instituted in their names. *Lash*, on interrogatory, says he is interested ; and though he has released, he is liable to costs. In the Prerogative, a nude executor, without any interest, has been repelled. Prior to examination, he must be dismissed regularly from the suit. All the other witnesses here are parties. On interrogatory, they swear they are neither parties nor interested ; but they could not have understood the nature of the question.

Sir *William Scott* contra.

The rules of the Admiralty Court are not to be narrowed to those of the common law, well suited to those Courts. I rely on the practice of the Court of Admiralty. Cases of salvage are generally brought on the affidavit of parties interested. There is no cross-examination. *Necessitas rei* is allowed to make an exception where the necessity appears. It has been said, the crew of the ship salvaged might have been examined ; but their examination would have been unnecessary, since the service is admitted, and they could not depose to what forms a great part of the case, namely, the hazard of the parties assisting.

Per CURIAM.

Sir *James Marriott*. — The evidence is only on one side. The six witnesses are all interested and parties. An agreement is asserted on the other side, but no allegation. A tender has been made, by which it is admitted that a service was done. An objection to the witnesses is now taken. The quantum of salvage is the question — hard to get at it. General rules are, in certain cases, to be departed from. In maritime cases, where no other witnesses are present, the Court must arrive at the truth by evidence of parties saved or saving : both are interested. In prize cases here, we examine only the crew of

another boat; and the Court is called upon to award reparation against that other boat, as the culpable cause of the misfortune — owing either to the wilful malice or gross negligence of the master. It will require therefore a preponderance of evidence to justify such a conclusion; and the Court will be directed principally by your judgment in deciding, whether the facts relied on do constitute such a case. The libel is framed in the alternative; charging circumstances from which positive malice and design are inferred, or culpable negligence. It is rather disadvantageous to the case that the accusation has been so framed; because, as the death of one of the mariners has ensued, if wilful design could be imputed, according to the plea, and according to some of the evidence, it would be a case for trial in the criminal jurisdictions of the country.

The opinion of the Court will be founded chiefly on the nautical evidence, and it will scarcely be necessary to advert to those articles which plead previous animosities between the parties, and declarations of ill-will as leading to the conclusion that this injury was designedly perpetrated. If the

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the captured vessel. In *France*, both are examined. Cases of salvage begin with affidavits — such are held to be evidence. In the *Esperance* 100*l.* was given on such evidence.

An offer has been made for pilotage; but these persons are not pilots. They go out of their course — delay ensues, and danger likewise of consequences from situation. There is no rule as to salvage. The business took two or three days: 30*l.* is not sufficient. I will not reject the evidence; nor determine on it if the owners choose to plead and prove an agreement. It will be for me to consider afterwards how the evidence shall weigh.

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nautical evidence should lead you to think that the conduct of the *Catherine* was not justifiable, such collateral matter might supply a motive or inducement, accounting for the misconduct; but it can hardly go further. You may therefore safely confine yourselves to *that* evidence, adverting only to other matters so far as in your opinion they may affect the credibility of the witnesses. The result of the evidence will be one of three alternatives: either a conviction in your mind that the loss was occasioned by accident, in which case it must be sustained by the party on whom it has fallen; or a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect: or thirdly, a conviction that the party charged with being the cause of the accident, is justly chargeable with the loss of this vessel, according to the rules of navigation which ought to have guided them. It is with great satisfaction that the Court can refer to Gentlemen of your experience upon these points.

In a cause of collision, where the loss was charged to be owing to wilful malice or gross negligence, the Court, with the assistance of *Trinity Masters*, being of opinion that the damage was occasioned by accident chiefly imputable to the mismanagement of the vessel lost, and not to the misconduct of the other vessel, dismissed the owners of the latter vessel with costs.

The *Trinity Masters* expressed their opinion — that the loss was occasioned by accident, imputable chiefly to the improper movement of the *Dart*; and in no degree owing to the misconduct of the *Catherine*.

COURT.—I adopt this opinion with perfect satisfaction; and as costs must have accompanied an award of damages, it is equitable that the defendant, in being dismissed from this suit, should be protected from the expenses he has incurred.

SYLVAN. BELL.

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1828.

THIS was a case of damage by collision, in which the *Sylvan* had been arrested in an action entered at 10,000*l.*; and no appearance having been given on the part of her owners, the Court was now moved, preparatory to a decree of sale, to sign the *primum decretum* on an affidavit that the ship was in a perishable condition.

In a cause of collision, the Court will preparatory to a decree of sale, sign a *primum decretum*, on an affidavit of a perishable condition.

COURT.—There is, I believe, no instance of such a decree in a case of collision; but it does not appear to me objectionable in principle: the process of the Court naturally leads to such a result, when it becomes necessary, in this class of cases as well as in others. The affidavit has been sworn in *Scotland* before a Commissioner for taking bail in prize causes: this is irregular; since it has been usual to require such affidavits to be made here, or to be taken upon commission. Upon this informality being removed, by a fresh affidavit, I shall direct this motion to pass.

An affidavit sworn in *Scotland* before a Commissioner for prize bail is irregular.

Motion granted.

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SIR FRANCIS BURTON. HARE.

In a cause of mixed military and civil salvage against the owners, the Court is unwilling, though no bail has been given, to disturb a valuation, not clearly excessive, made under a reference on the spot to three arbitrators chosen by the salvors and consignees of the vessel.

THIS *English* vessel in the port of *Sagua*, in the island of *Cuba*, was attacked by pirates: a conflict ensued, in which they were driven off; but the master was severely wounded, and the next day he was carried up to *Sagua*. The ship was attacked again and plundered by the pirates. In that state, deserted by her crew, she was found by the boats of H. M. S. *Espiegle* (*Yates*, commander), which, with 26 men, came to her assistance. They brought back the crew, recovered the sails, refitted the vessel, and at the request of the master (still apprehensive of the pirates), conveyed the ship eighty miles to a place of safety. The crew were employed in these services about fifteen days.

On a claim for salvage at the *Havannah*, the consignees of the vessel had consented to submit the claim to the arbitration of three persons, one of whom was the agent of *Lloyd's* at that port. The ship was valued at 780*l.* and the arbitrators gave one third. It appeared afterwards that the ship had incurred such heavy expenses that there were no means of paying the salvage; and the consignees gave up the papers to the salvors and referred them to the owners of the brig in *London*.

They were accordingly cited to show cause why the salvage awarded should not be pronounced due to the commander and the rest of the officers and crew of the *Espiegle*, and they appeared to the monition.

Phillimore for the owners. — The appraisement is beyond the real value, and the allotment of salvage is excessive. The vessel was not worth more at the *Havannah* than 400*l.*; 700*l.* had been laid out upon her there, and she is now to be sold for 600*l.* To a king's ship one third is an extravagant rate of salvage, when, for war salvage, one eighth only would have been allotted.

SIR FRANCIS
BURTON.

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Lushington contra.

In the *Betsey*, WINPENNY, 5 Rob. 295. this Court refused to reduce the estimate on which the ship had been taken out of the possession of the salvor on bail. The owners are not now competent to dispute the appraisement; and the Court will adhere to the valuation and to the award. There is, in this case, an union of military and civil salvage.

In reply.

In the case of the *Betsey*, the valuation was made by the parties themselves.

JUDGMENT.

Sir *Christopher Robinson*. — Every thing has been done most beneficially for the owners, under the superintendance of their own agents assisted by the agent of *Lloyd's*. If bail had actually been taken so as to bring the present case within the case cited, there would have been sufficient to induce the Court not to disturb what had been done, as it would be unwilling to discourage the settlement of such questions on the spot in a fair and liberal manner. The valuation does not prove that the estimate was excessive with reference to the value of the vessel at the *Havannah*: she might perhaps have an opportunity of earning a freight. In respect to the other point, war salvage has always been considered as fixed at a low rate, and has been in-

War-salvage, being generally fixed at a low rate, may on special services, in the nature of civil salvage, be increased.

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creased on special services. The difficulty arises chiefly from the small value of the property under consideration; but, upon the whole, it will be most advisable to give a specific sum, abating something in the estimate. The Court therefore gives 200*l.* with the expenses.

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MALTA. YOUNG.

Though under the principle, that freight is the mother of wages, mariners lose their wages by an interruption of the voyage from accident, the condemnation of the vessel for illegal trading on the part of the master, to which the mariners are not parties, does not work a forfeiture of wages, nor even bar the mariners of their action against the owners; and charges of disobedience, neglect of duty, of intoxication and mutiny, not being established, wages pronounced for.

THIS was a suit for wages brought by *John Walker*, late mate on board the *Malta*, against the owners, Messrs. *Ramsden* and *Booth* of *Liverpool*. The summary petition stated the services of the mate, and the circumstances under which the vessel had been seized by Capt. *Willes*, of H. M. S. *Brazen*, and condemned at *Sierra Leone* for a breach of the slave abolition acts. The admission of this summary petition was opposed on the general principle, that wages were not due till the arrival of the vessel at her final port of destination; and upon the grounds that it was the first claim of the kind; and that the remedy of the mate was against the ship itself, or proceeds arising from the sale of the ship, which were in the registry of the Admiralty Court. Lord *Stowell* having admitted the petition, reserving the question of law, an allegation on the part of the owners, charging the mate with disobedience, neglect of duty, intoxication, and mutiny, was admitted without opposition. Upon the summary petition three mariners were examined. Upon the allegation the master was examined, and

it was submitted, that his evidence was given under a bias, as the mate had been a witness against him upon his (the master's) trial at the Admiralty Sessions for piracy; and that the present case was the first in which there had been an attempt to establish a charge of mutiny on the evidence of the master.*

Lushington and *Addams* for the mariner.

The *King's Advocate* and *Dodson*, contra.

JUDGMENT.

Sir *Christopher Robinson*. — This is a cause of wages brought against the owners of the *Malta* by the mate, who had entered into the service of the ship at *Liverpool* in *March 1825*, for a voyage to the coast of *Africa* and back to this country; he continued in her service till she was seized and brought to adjudication at *Sierra Leone* for alleged trading in slaves. On those proceedings the vessel was condemned, and that sentence is now the subject of an appeal in this Court.† The master

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* On the 21st of *November 1827*, the proctor for the owners brought in the log-book, which had been sent from *Sierra Leone*; and at the hearing, it was objected, for the mate, that, not being pleaded, it was inadmissible; and upon its being stated that the entries were in the hand-writing of the mate, it was replied, that that circumstance should have been put in plea, and the parts to be relied upon pointed out, that the mate might have explained under what circumstances the entries were made. The Court permitted the log to be adverted to, observing, that it would be a convenient practice if the parts of a log which were material, could be agreed upon by both parties, and extracted.

In a suit for wages, a log-book, not pleaded but asserted to be in the mariner's hand-writing, allowed to be brought in by the owners.

† The question, arising on the appeal from the sentence of the Vice Admiralty Court at *Sierra Leone*, condemning the *Malta* for a breach of the slave abolition laws, related to the real character of the alleged trading. The evidence showed,

Where the master, unknown to the owners receiving persons on

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has also been indicted on the same charge at the Admiralty Sessions at the *Old Bailey*, but acquit-

board as pledges and not under an absolute sale, the Court, on appeal, holding such conduct did not, under the particular circumstances of the case, subject the ship to condemnation under the slave-acts, reversed the sentence of the Court at *Sierra Leone*, but allowed the captor his expenses, costs, and insurance of the vessel.

that it was the common practice of the native merchants to pledge their wives and children for the delivery of goods contracted for in barter with the trading ships; and that such pawns or pledges were, in some instances, not redeemed, but carried into slavery, as the absolute condition of such contracts, agreeably to the general practice of the natives in their dealings with each other. The Court referred to passages of the evidence taken before the Board of Trade upon these points, and also to similar instances in the regulations of other countries where a system of slavery has existed — particularly in *India*, as noticed by Mr. *Halhed* in his work on the *Gentoo* laws: — “Whoever has been given up as a pledge for money lent recovers his liberty whenever the debtor discharges the debt. If the debtor neglects to pay the creditor his money, that person becomes the purchased slave of the creditor.” The Court alluded also to the general principles of the law of hypothecation, as laid down in *Heineccius*, vol. 6. p. 410, and in *Pothier*, vol. 5. p. 417., respecting the transfer of the property in the thing pledged; and observed, — “there seems to be no difficulty in understanding the nature of this contract. It was a sort of conditional transfer of the personal freedom of the individuals; and so long as the condition was depending undetermined, it would be agreeable to general construction to judge of the legal character of such contracts according to the alternative which might eventually become illegal.” Adverting also to the extreme jealousy with which the abolition laws have prohibited every approach to the offence of holding persons as slaves, in the intercourse of *British* subjects with the coast of *Africa*, the Court remarked, — “such a practice could not be consistent with the provisions of the abolition acts, and it strongly behoves *British* subjects trading on the coast of *Africa* to discontinue the practice, as likely to involve them in a criminal violation of the law:” The offence alleged in this information was “the transferring the individuals so held as pawns to a *Spanish* slave ship, for the purpose of being transported as slaves beyond the seas.” The Court then entered on a full examination of the evidence (which was contradictory, obscure, and liable to some discredit as coming from a dissatis-

ted ; and it is not necessary to say more on that point at present.

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fied crew), as to the time and circumstances of the principal part of the transaction, the object with which the money — 100 dollars — was paid by the *Spanish* captain, and summed up its conclusion in these words: — “ Notwithstanding the deductions to be made from the credit of the master in the explanation given by him, I think the owners are entitled to the benefit of the inferences that may be drawn from it, and other parts of the evidence. There is enough to show that the transfer was not that of absolute and intentional sale of these persons to the *Spanish* captain; the number of the persons was small, being only two or three women, — others having been redeemed and restored at different times. They were women belonging to the principal traders, and had come from that part of the coast to which the *Spanish* captain was going; and some of their relations were actually on board — who were not transferred — but went away in their own boats. The transfer to the *Spanish* captain arose incidentally out of a barter for other articles, — and the character of it is not perfectly clear. Some evidence has been since supplied to show that these persons were actually restored to their friends; though the Court may wish that fact had been more satisfactorily established. The evidence of *Jackson* and *Pepper* on the main parts of the case, the negotiation for payment, and the repeated and unnecessary declarations which are said to have accompanied the transfer, are such as cannot safely be relied on. Believing it to be untrue in many particulars, I feel that I should not be warranted in pressing other doubtful and unfavourable inferences to the prejudice of the owners, who were entirely ignorant of the whole transaction. I abstain, therefore, from saying more as to the legal consequences of such a transfer of slaves, as pawns, in the hands of *British* subjects, under the present state of the law of this country, — and as to what might be the responsibility of owners or freighters of ships, and the proprietors of cargoes, mixed up with such transactions, for acts of their agents of that kind, of a definite character and clearly proved.

“ On the examination which this case has undergone before me, I do not concur in the sentence of the Court below; and without impeaching the grounds on which that judgment was

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On the effect of this seizure it is contended, that, as the vessel was condemned for illegal trading during the voyage, and the voyage on that account interrupted, and freight not earned, the wages are not due; or in more qualified terms, that, if wages are due, they should have been recovered against the master, or against the proceeds of the vessel in the registry, since the alleged act of slave trading was not in any manner imputable to the owners.

On the effect of this objection it will be proper that I should state what I consider to be the principles of law on this point, as it is said, in some places, that there has been no judicial decision upon it in the courts of this country.* The objection was taken, I understand, upon the admission of the summary petition; but reserved to the hearing, no authority being produced to show that the loss of freight under such circumstances would work a forfeiture of the wages; and no such authority is now adduced. If we look to general principles, as they are to be collected from the maritime codes, or the practice of other countries, I find that a distinction has been made between those

founded, I feel it to be my duty, on a fuller investigation of all the facts of the case, as they have appeared in this court, and also in the criminal prosecution against the master at the Admiralty Sessions at the *Old Bailey*, to reverse the condemnation; and I direct the captor's costs to be paid.

The Court, on a subsequent day, allowed 120*l.* for the insurance of the vessel to *England* by the captors (who had delivered her to the owner); as had been done in other instances in which the captors had not effected the insurances unnecessarily. The *Real Dugue* (Privy Council, 1797), and the *Narcissus* in 1801, were cited to this effect.

* Vide *Jacobsen's Sea Laws*, p. 153.

accidents by which voyages may be interrupted and the interests of mariners affected, as dependent on their successful termination, and other causes arising from the acts of the owners or masters. As to the effect of condemnation for illegal trading, in cases of common guilt there would be no room for such a distinction in favour of mariners; but, where they are in no manner implicated in the illegal act, so far as I can learn, the condemnation of the vessel has not been held to work a forfeiture of their wages. I do not find that there has been any adjudged case on this point; but it has been asserted in argument and not denied, in the common law courts, that if there has been a lading of prohibited goods on board a ship, though it subjects the vessel to a forfeiture, yet it disables not the mariner of a remedy for his wages.* This distinction is noticed as an exception to the general rule, that freight is the mother of wages†; and it may be traced much higher. It may be found in *Viner's Abridgment* ‡, and by him it is quoted from *Malyne* § who wrote in 1622; and there is some trace of an adjudged case in these references; and *Postlethwaite*, in his dictionary, repeats the same passages almost *verbatim*, and cites, "King's Bench, Trin. Term. 7 James." But I have not been able to find any such case.

Besides these authorities, going through two centuries, and showing at least the understanding and usage of merchants, I am enabled to

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* *Abernethy v. Langdale*, 2 Doug. p. 539.

† See the *Neptune*, CLARK, Vol. I. p. 231.

‡ Tit. Mariners, (A) 11. 15. (E) 6.

§ *Lex Mercatoria*, p. 105. c. 23.

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add from the notes of Sir *Edward Simpson* *, who was a person of great experience and learning in the practice of these courts, a *dictum* or opinion to the same effect. In reference to some particular case it is there said, "no wages would have been due to the mariners if the ship had been taken by the enemy or by pirates, or had been cast away, yet in the present case the mariners will be entitled to their wages to the time of the seizure of the ship; for where a ship is seized by an ally for want of proper documents, or for a prohibited trade, though no freight may be earned, the mariners not being in fault will be entitled to their wages." I find also, that the same principle prevails in other countries †; and if the condemnation of the vessel does not in itself work a forfeiture of the wages, I see no reason for considering it as a bar to the action against the owners; because as the remedy is given to the mariners for their additional security, it would be unjust to deprive them of the benefit of it merely on the ground, that the owners may in the particular case be as innocent as themselves of the illegal act which has occasioned the condemnation of the ship. The Court therefore cannot admit the objection as exonerating the owners from their general responsibility: and I proceed to the other grounds of misconduct which have been *alleged* against the mate, and to the examination of the evidence by which it is supported. The evidence consists of the depositions of three witnesses, *Pepper*, *Jackson*, and *Wilson*, on the

* He was Dean of the Arches and Judge of the Prerogative Court from 1758 to 1764.

† *Jacobsen*, p. 153.

summary petition; the depositions, of two of these persons, *Pepper* and *Wilson*, on a responsive allegation on the part of the mate; and the depositions of the master, on the allegation given in on part of the owner; and the examination of *Ellis*, the master of another vessel belonging to the same owner, on an exceptive allegation, to the testimony of the adverse witnesses.

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It appears that the original crew consisted of fourteen men: of whom four or five died on the coast, and no account is given of the remaining persons, on either side.

The witnesses on the summary petition speak generally to the substance of what is there stated; and bear testimony to the good conduct of the mate.

Interrogatories have been addressed to them for the purpose of impeaching their credit, and of drawing from them an admission of their own misbehaviour and of the general bad conduct of the crew: and they *are* contradicted in their answers, by the entries of the log, which do certainly record instances of misconduct of the crew, and of some of these witnesses. It is attempted to discredit them, from these contradictions, and the Court will not rely much on any thing that depends on these persons alone. Their denial, however, of any misconduct on the part of the mate, is in part confirmed by the master's own account, to which I shall presently refer. It is proper to observe, however, on the discredit so thrown on these witnesses, that it is derived chiefly from the entries on the log, which were made *by the mate* himself, and therefore there is no reason to suppose that these false representations were framed in concert

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In a suit for wages, service and good conduct are to be presumed till disproved.

with him; still less can it be imagined that the general misconduct of these men or of the crew, so disclosed, was considered by the mate as implicating him in any manner that would affect his wages: and it may be observed also, that the evidence of these persons is of no great importance, as it amounts to little more than the general averment of service and good conduct, which is pleaded in the petition and may be assumed till it is disproved or contradicted by the evidence on the part of the owners, to which I will now proceed.

The allegation on their part pleads, that "soon after leaving the port of *Liverpool*, *Walker* was frequently intoxicated, and behaved in a mutinous and riotous manner; that he did not perform his duty as mate, and was disobedient to the lawful commands of the master;" and, referring to the desertion of some of the crew on the 28th of *July*, charges him with having the watch at that time, and alleges, "that he was well aware of such desertion, but did not take means to prevent it, or give timely information thereof to the master."

With respect to these two charges, I think the evidence of the witnesses, on the summary petition, who deny the fact, is confirmed by the master himself, who acknowledges that "until the 8th of *September* 1825, he cannot say that *Walker* was frequently intoxicated, nor that he behaved in a mutinous or riotous manner, nor that he did not perform his duty, nor that he was disobedient to the lawful commands of the deponent." And afterwards, though he attempts to say, in opposition to what I have just read, that he was disobedient to orders, by neglecting to keep watch and *retiring* to

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bed, on the night of the desertion, "he cannot take on himself to swear that he was aware of the desertion till the alarm was given." With respect to the fact whether *Walker* had the watch at that time, it is otherwise stated, by some of the witnesses, who say it was the boatswain's, or second mate's watch: and the entry in the log on that occasion, which is made by *Walker*, seems to refer to some other regular watch; the entry being, "We were alarmed by the watch on deck." The entry of the preceding day also rather negatives the supposition of any friendship or intimacy between him and *Lloyd* and *Walker*, as it is there stated, "the captain checked *Lloyd's* proceeding, whereon he said he would shoot the captain if he had a pistol; that he would embrace the first opportunity to put it in execution, and shoot me also, and called us pirates." This entry ranges the mate on the side of the master, and does not by any means support the further imputation of the master, "that *Walker* did not, on that or any other subsequent occasion, aid or assist him, as he was bound to do, in enforcing obedience; that, if he had done his duty, and stood by the master, he would have enforced obedience: as it was, from the time of the desertions he was obliged rather to humour the crew than to command."

There seems to have been no want of forcible coercion in the exercise of the master's authority, so far as we can judge from the instances recorded of putting small chains round the legs of the delinquents, and of chaining them to trees on shore, for five or six days. He suspended *Pepper*, and also the mate on one occasion; and as these circumstances are all faithfully recorded, there seems

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to have been no disposition in the mate to weaken the lawful authority of the master.

It is impossible, however, I think, to contend against the general declaration of the master, "that until the 8th of *September*," he could not say, that *Walker* was guilty of any of the offences imputed to him; and we can only wonder, how such charges, so unsupported by the only man who could have given information on the subject, could have found their way into the allegation.

The account which the master gives of the behaviour of the mate on the 8th of *September*, on that occasion—that he was drunk and insolent, agrees with the plea, and if it is true, is certainly an instance of irregularity and misbehaviour. But we are to recollect, that it is not a single instance of intemperance or indulgence, and particularly when a vessel is lying at anchor or in port, that will amount to a forfeiture of wages.

A single instance of intemperance does not work a forfeiture of wages; it must be a habit to produce that effect.

My predecessor had frequent occasion to make that remark*: and it seems to be supported by the construction of the courts of common law, since when drunkenness is mentioned as a cause of forfeiture of wages, it is *habitual* drunkenness which is said to produce that effect.†

The master, however, specifies three other instances, on which *Walker* was drunk: he says, "he was drunk on the 10th of *September*; on the 30th, off *Cape Lopez*; and in *November*, off the *Muskito* shore."

There are no aggravating circumstances stated with respect to these instances, and it is to be ob-

* See 2 *Robinson*, 261.—The *New Phoenix*, Vol. I. 199. *Lady Campbell*, *suprà*, p. 5. *Ealing Grove*, *ib.* 15.

† *Abbott on Shipping*, 5th ed. p. 472.

served, that they are not specified in the allegation. The witnesses, in denying that they saw *Walker* drunk, distinguish "between such drunkenness as disabled him from doing his duty;" and the evidence of Capt. *Ellis* on the exceptive allegation seems to point to some such distinction.

It has been pleaded, "that the mate was drunk on that and other occasions;" to which Capt. *Ellis* says, "that, on several of the occasions of his being on board the *Malta*, while lying off *Lamma*, and off *Cape Lopez*, comprising the time from the 6th of *September* to the 27th, when the *Morning Star* sailed for *England*, he perceived *Walker* to be the worse for liquor, but not actually drunk; he was elevated by liquor, so as to appear to have lost all respect for his superior officer. He conducted himself in a manner very little short of actual insubordination; but he cannot recollect any positive act which passed in his presence: *Walker's* conduct was that of a man who, under the influence of liquor, did not care for any thing."

This is the worst which Capt. *Ellis* can say of him, and when it is remembered that he was in constant communication with the master from the 7th to the 27th of *September*, a period of time which comprehends two of the four instances of intoxication specified by the master, the tenour of his evidence does not, I think, imply that *Walker's* conduct had been the subject of complaint or observation between them. It is to be observed also that there was a daily intercourse; there was a transferring of redwood and other articles of the cargo between the two ships, during that time, in which the mate must have been principally employed; and the manner in which the entries in the log are made,

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and the whole keeping of the log, does not appear to me to be the work of an habitual drunkard, nor of a man careless or neglectful of the duty of the ship. I think, therefore, that the charge of drunkenness, in the sense that would be necessary to support this charge and work a forfeiture of wages, completely fails. With regard to the charge of mutinous or disobedient behaviour, the testimony of the master, on this point also, absolves the mate from all blame up to the 8th of *September*. The instance, chiefly relied upon after that time, is, the fray that happened on the night of the 25th of *October*. It is not very easy to understand in what manner that quarrel arose, nor whether the different accounts refer to the same transaction; but if I take the master's own statement, it, by no means supports the plea, "that *Walker* struck the master and knocked him down, when he and others of the crew dragged him to the gangway, knocked his head against the gunwale and kicked him on the face, and thereby stunned him and confined him to his cabin all night without assistance."

Now, on the master's own statement, the mate appears to have first attacked the men, who had improperly intruded themselves into the master's cabin; and it is not till after the master had interfered in a fray between the mate and one of the men, in support of the master's authority, and had collared the mate, that any blow is struck by him. The *violent blow* which is spoken of was struck by some one behind. The knocking of the master's head against the gunwale, which is charged against *Walker*, is not spoken to: it was altogether a scene of confusion, arising out of the festivities encouraged by the master, or else from accidental

misunderstanding. It is impossible to consider the scuffle so produced, even as described by the master, as sufficient to support the charge of mutiny.

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It is to be observed also, that although the entries in the log of the 27th and 28th of *October*, which seem to relate to this occurrence, show that there had been some exercise of authority on the part of the master, by which the mate had been suspended, yet there had been a subsequent restoration of the mate to the duties of his station. It will be unnecessary in this case to decide how such a forgiveness might affect a forfeiture of wages, actually incurred under other circumstances. But I think I may safely say there are no relations of duty, in which it is more expedient to encourage a spirit of forgiveness and reconciliation for occasional offences, than in the quarrels between such persons; and that policy appears to have been fully recognized in all the ancient maritime codes.

The next charge relates to the offence of trading at *Prince's Island* with the ship's cargo, without paying any duties. The manner, however, in which this was done implies that the mate and the steward, *Pepper*, who is involved in the charge, conceived they were acting agreeably to the intentions of the master, — for, according to the master's own deposition, they accounted to him for the money; and the tone in which he says, he reproved them for it, in *desiring* it might not be done again, shows that he considered it only as an imprudent act, and not as any serious misconduct. The charge of purloining thirty-three pieces of cloth is obscurely stated, and is not proved in any

MALTA.

April 22d,
1828

An information against the vessel for trading in slaves by the mate, not appearing to be a false or malicious act, cannot work a forfeiture of wages.

manner, particularly against the mate. The act of embezzling is treated as a cause for withholding a proportionate part of the wages of mariners * ; but I do not know that it is considered as a cause of entire forfeiture of wages otherwise earned.

The fifth article pleads the part which the mariners are supposed to have acted, in giving the information on which the vessel was seized and condemned. I do not perceive, that this act is proved in any manner to have been done by the mate ; but if it had, unless it could be shown to have been a false and malicious act, I do not see on what principle it can be considered as a cause of forfeiture of wages. That the information was false in fact is not proved by the verdict of acquittal : on the contrary the master, in his defence, admitted the transfer of the women to the master of a *Spanish* slaving vessel, and there was evidence of money passing between them. He rested his defence only on his explanation of that act, that the *Spanish* master had agreed to put them on shore, in their own country, about a hundred miles further on the coast ; and that he was empowered to receive the money for which they had been held in pledge. I will not say more of this transaction at present, than that it was highly imprudent and culpable ; and that it was very fit to be made the subject of enquiry before the tribunals of the country, under the strong terms in which every act contributing towards trading in slaves, or holding persons in slavery on the coast of *Africa*, is reprobated and prohibited by the abolition acts.

I must observe further, that the 51 G. 3. c. 23. s. 9.

* See *Abbott on Shipping*, 5th ed. p. 472.

which is embodied in the slave consolidation act, encourages information to be given by petty officers and mariners of any act of slave trading committed by the master; and on the assurance that they shall be exempted from the penalties so incurred under that statute. It would not be consistent with the policy of that statute, nor with the general principles of law, to hold that the forfeiture of any legal interest should be incurred by the mariners, acting in the enforcement of the penalties of the law, although the owners might be affected thereby: on this view of the case, I do not feel myself warranted to pronounce that any act of misconduct has been alleged and proved on the part of the owners, that will absolve them from the demand of wages which is the subject of this suit, and I pronounce accordingly for the payment.

 MAYFA.

 April 22d,
 1828.

 SHANNON. PENNEFATHER.

 April 29th,
 1828.

AN action was entered in 400*l.* against a steam vessel, the *Shannon*, for damage to the *British Union* off *Beachy Head*. From the affidavits it appeared that the *British Union* was going up, and the *Shannon* down the Channel; that the *Shannon* had seen the *Union* five miles off, but that the *Union* did not see the steam vessel till just before the collision.

The *King's Advocate* and *Haggard* for the *Shannon*. — The *Shannon* was on the starboard

In a cause of collision against a steam vessel, the Court, assisted by Trinity Masters, pronounced for damages and costs; holding, that the steam vessel, being more under command, and manifestly having seen the other vessel, was to blame.

SHANNON.

April 29th,
1828.

tack ; and the rule of navigation is, that when ships are crossing each other in opposite directions, and there is the least doubt of their going clear, the ship on the starboard tack is to persevere in her course ; while that on the larboard is to bear up, or keep more away from the wind ; that in this latter situation was the *British Union*, and if she had followed the rule of navigation the accident would not have happened. The affidavits showed that the crew of the *Shannon* believed that the *British Union* would bear up.

Lushington and *Nicholl* contra.

The advantages which belong to steam boats distinguish this from an ordinary case of collision ; that even admitting the general rule of navigation to be correctly stated, it would not justify a vessel, having the power to avoid a collision, in standing upon any such privilege, if she foresaw the disastrous consequences of persisting in such a course. Here it was proved that the *Shannon* perceived the *British Union* at a distance of several miles ; but independent of this circumstance, steam boats, it was well known, always went to the larboard.

COURT. — If the state of facts were clear and undisputed, the Court would be disposed to concur in the argument, that the rule of navigation should be applied according to the characters of the two vessels ; but here the testimony is conflicting, and the defence of the *Shannon* partly is, that she actually supposed the *British Union* intended to bear up.

The *Trinity* Masters observed ; — whether the wind was N. W. as represented by the *Shannon*, or N. N. E. is of no very great importance, as the

Shannon, not receiving her impetus from sails but from steam, should have been under command. Steam boats from their greater power ought always to give way; upon this consideration, and also being satisfied that the *Shannon* had seen the *Union*, they were of opinion the *Shannon* was to blame.

The Court accordingly pronounced for damages and costs.

SHANNON.

 April 29th,
1828.

CONCEPTION. ERUZUMA.

 May 6th,
1828.

HAGGARD moved for a *primus decretum*. This was a derelict brought into the River *Mersey* by the brig, *Magdelaine*, on the 1st of *August* 1827. On an affidavit of the owner of the brig, founded upon a report of surveyors at *Liverpool*, as to the state of the derelict, a decree of appraisal and sale had been suffered to issue before the usual defaults had taken place, and consequently before the *primus decretum* was signed.

The proceeds, 192*l.* 4*s.* had been brought into the registry; but the disbursements exceeded 66*l.*

On this day, upon the Proctor for the Admiralty not offering any opposition, the Court signed the *primus decretum*; and, under the circumstances of the case, permitted the proceeds, upon the usual security, to be paid out of the registry for the use of the salvors, without a further special application to the Court.

A sale of a derelict having been previously allowed, and the proceeds brought in, the Court signed the *primus decretum*, and at the same time permitted the proceeds, which were far less than the disbursements, to be paid by the salvors.

Motion granted.

May 13th,
1828.

GENERAL PALMER. TRUSCOTT.

The Court, assisted by Trinity Masters, held, that if towing is necessary, pilots are bound to perform it, having a claim for compensation for damage to their boats, or for extra labour: they are bound to offer their services in all weathers, and their claims for extra compensation are *stricti juris*. A tender of 50*l.* held sufficient, and the pilot's costs refused.

THIS East Indiaman, bound for *Madras*, had sailed from *Portsmouth* on the 12th of *January* last, and on the morning of the 13th, a violent gust of wind, off *Portland*, carried away her masts. A jurmast was rigged, under which she directed her course back to *Portsmouth*, and had reached *Dunnose*, when a pilot was taken on board. No signal of distress was flying. The pilot recommended that his boat should be employed to tow, and threatened to leave the vessel, if this recommendation was not complied with. Captain *Truscott* refused, and told the pilot to leave the ship at his peril. Subsequently, the pilot-boat (which had quitted the ship) was recalled, and was occupied for three hours in towing the vessel into *St. Helen's Roads*. The boat sustained some little damage; and Captain *Truscott* tendered at first 20*l.* to the pilot for his services, which was rejected; and this suit was instituted against the ship, her tackle, and cargo, and also against the owners and master thereof; and in *March* a tender of 50*l.* was also rejected.

The value of the ship and cargo was estimated at 25,000*l.*, and bail was given to the amount of 2000*l.*

The Court was assisted by two of the elder brethren of the *Trinity House*.

Phillimore and *Addams* for the salvors.

Lushington and *Dodson* contra.

JUDGMENT.

GENERAL
PALMER.May 13th,
1828.

Sir *Christopher Robinson*. — The Court is very glad that the attendance of *Trinity* Masters has been requested; not because the case involves any nice question of nautical skill, but as it gives the Court an opportunity of expressing some general observations on this class of cases in the presence of members of the *Trinity House*, who have a control vested in them over pilots, and in some respects a jurisdiction in cases of extortion or misbehaviour that might be exercised on the same facts, that might be set up as grounds of merit in this Court; constituting, therefore, under certain circumstances, a kind of concurrent jurisdiction.

This case originated in pilot service, as the men plied in that capacity and were so employed: when the pilots were told that if they left the ship it would be at their peril, they protested against any such intention, apparently under an anxiety to justify themselves in the discharge of their duties as pilots. The case comes, therefore, under the general provisions of the acts which have been passed for the regulation of that service*; unless the circumstances distinguish it from general pilot service. This, indeed, is contended on behalf of the salvors; and is also admitted in a slight degree on the part of the owners, by the tender of 50%. The Court is impressed most strongly with a desire to put an accurate construction on this general question, from having had occasion to notice, during the last three months, other instances in which pilots on the coast have advanced unreasonable claims of

* See 6 G. 4. c. 125.

GENERAL
PALMER.

May 13th,
1828.

salvage. * Of the present case, you, Gentlemen, will judge on the evidence and the arguments which you have heard. Considering the nature of the service and the provisions of the pilot acts, which have fixed a rate of remuneration on a liberal scale, with a power in the *Trinity House* to make alterations, and with a liberty of appeal on the part of the majority of pilots, if the rates should appear to them to be insufficient: — considering that pilots have an exclusive privilege of service; that they are

March 12th,
1828.
In extraor-
dinary pilot
service, ad-
ditional pilot-
age is the
proper rate of
reward.

* In the *Enterprise*, CROSBIE, in which a pilot-boat had been employed by a steam-vessel, (that had lost her rudder,) to steer or tow her into *Plymouth*, about 35 miles, the Court adverted to the obligation of pilots, under the 6 *Geo. 4. c. 125.* and to the general principles of the maritime law, of allowing for extraordinary pilot services in cases where a vessel, in distress, might be compelled to seek a port, and held, that additional pilotage would be the proper rate of reward for such mere pilot services. And, adverting to the ordinary rates of pilotage at *Plymouth*, viz. about a guinea for every league, the Court gave the sum of 20*l.*, being double the rate of common pilotage and 15*l. nomine expensarum.*

Persons, as-
suming the cha-
racters and du-
ties of pilots,
are only to be
remunerated
according to the
rates of that
service, and not
as salvors.

And in the *Columbus*, NERROLL, (13th June 1828), in which a *Bridlington* fishing-boat had gone out of harbour, on a signal for a pilot, to the distance of about thirteen miles, and had helped to steer the vessel (an empty trader from *London*) into that port; the Court held, the tender of 1*l. 10s.* sufficient; — and referring to the case of the *Michael*, 31st July 1805, in which Lord *Stowell* had refused to consider fishermen (taken on board in the Channel as pilots) entitled to be rewarded as salvors, observing, “that they were engaged as pilots, and if they assumed that character they ought to adopt the rules, and be remunerated according to the rates of that service,” the Court reprobated the practice of instituting claims for salvage in such cases at an expense far beyond the value of the services, and refused to grant any further reward; and declared it to be its duty to be very strict in holding cases of this description to their proper character.

expected in return to be always ready ; and that they are under an obligation to afford their assistance, unless under circumstances of absolute danger to their lives, it is of great public importance that these acts should be faithfully interpreted, both by the pilots themselves, and by this Court, on any estimate that It may be required to take of claims of salvage growing out of such services. I repeat, therefore, that the Court is glad in being assisted by the judgment of members of the *Trinity House* on these questions, — Whether the state of the wind and of the tide made it impossible that the vessel should have been brought into *St. Helen's* without towing ; whether the assistance of towing was such an addition to the services, ordinarily required from pilots, as to constitute a salvage service ; whether the towing in this case occasioned a material damage to the pilot-boat ; and whether the general circumstances are such as found a case of extraordinary danger or labour, and thereby justify a claim for salvage remuneration.

GENERAL
PALMER.

May 13th,
1828.

The *Trinity* Masters said, their opinion was, that the vessel might have reached *St. Helen's* without assistance from the pilot-boat ; and that if towing was necessary, pilots were bound to perform it, having a claim of compensation for any damage to their boats, and for extra labour ; that pilots were bound to offer their services in all weathers ; and that the facts of this case did not establish a claim for remuneration beyond the tender.

COURT. — The Court entirely concurs in this opinion ; and is deeply sensible of the necessity of holding strict the construction to be put on this class of cases. It, therefore, pronounces the tender

**GENERAL
PALMER.**

May 13th,
1828.

A tender, not
accepted in due
time, may be
reduced by the
Court.

to be ample, and reserves the question of costs till they shall have been taxed, and It may be informed what expenses have been incurred by the rejection of the tender.

In future cases, I shall neither hold the Court nor the owners bound in any manner by a tender not accepted in due time; being fully aware of the advantage which has been taken by salvors of the rule as to tenders* in speculating upon the chance of not suffering a diminution by costs, owing to the liberality which the Court has applied to salvage cases. †

On the 10th of *June* the Court rejected the application for costs on the part of the salvors, but declined to condemn them in costs, as it was stated that the tender had been refused by advice of counsel.

July 16th,
1828.

* See *Vrow Margaretha*, 4 Rob. 106. And Vol. I. p. 156.
† In the *Albion*, BURRELL, where a tender of 2*l.* accepted by 29 co-salvors for towing the *Albion* (on fire about eight miles from *Hustings*) into port, was confirmed, the Court expressed its disapprobation at the suit, remarking also upon the action having been entered at 300*l.*, and condemned the salvor who had instituted it, in 5*l.* costs.

FRUIT PRESERVER. BROWN.

July 5th,
1828.

LUSHINGTON moved for a warrant of arrest, for the purpose of transferring the possession of this ship to the mortgagee or purchaser under a conditional transfer, to secure a debt of 400*l.* under a deed dated *July 1825*. The deed recited that, on default of payment in 1827, the interest should become absolute in the purchaser to secure the amount of the money lent; and in the meantime that the vendor (the master), should continue in possession. The 6 *Geo. 4. c. 110. s. 45.* seemed, he submitted, to confirm such a title; and to take the case out of the former practice and decisions of the Court. The Court of Chancery could not give the mortgagee possession, and the owner being a bankrupt, it was of no use to sue him personally.

The Court of Admiralty does not interfere in cases of adverse title, nor does 6 G. 4. c. 110, extend its jurisdiction, or make ships more absolutely transferable under a conditional bill of sale for the purpose of security, than before.

A warrant of arrest refused for the purpose of transferring the possession to the holders of such a bill of sale.

It was stated on affidavit that *Brown*, the owner and master, was about to sail from *Liverpool*; and that unless the Court would grant this application, there was no other mode of enforcing a sale.

COURT. — The Court, advertng to the *Guardian*, BEATON *, the *Aurora*, THOMPSON †, and the *Sisters*, TUBBS ‡, observed: — This is substantially a case of adverse title, in which this Court in modern times has declined to interfere. § The circumstances are strong; the debt small, the pos-

* 3 Rob. 94. † *Ib.* 135. ‡ *Ib.* 214. 5 Rob. 155.

§ See *Warrior*, PEACH, 2 Dod. 288. The *Pitt*, CROSSB, Vol. I. 240.

FRUIT PAR-
SERVER.

July 5th,
1828.

session continuous; the default of payment occurred in 1827, and no proceedings were instituted till 1828. In such a case the Court thinks itself bound to decline to interfere. The 6 *Geo. 4.* does not increase the jurisdiction of the Court, or make ships more absolutely transferable, in this form of conditional bill of sale for purposes of security, than they were before; it is, on the contrary, intended to set at rest doubts that have been entertained on the effect of such bills of sale; and enacts, that mortgagees shall not be deemed owners, "except so far as may be necessary in order to render the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts for the securing the payment of which such transfer shall be made." * According to my apprehension, a mortgagee is not an owner under this section, except for security. It is said there is no other mode of enforcing a sale than under the process of this Court; but the matter not being properly within the jurisdiction of this Court, it will only lead the owners into further difficulties and expense to assume a power which cannot be sustained. I must reject this application. †

* 6 *G. 4. c. 110. s. 45.* † See the *Portsea*, LAMB, *supra*, 84.

CHRISTIANA. LARSEN.

July 16th,
1828.

THIS was a cause of collision. The action was entered against the *Christiana*, a foreign ship and her freight, and the warrant of arrest had issued in the usual manner. An appearance was given under protest for the foreign owner of the ship, alleging, that the *Christiana* was bound to *Norway*, and when the collision took place was off *Broadness Point* in the River *Thames*, and without the jurisdiction of this Court. That *Cole*, a duly licensed pilot, was on board, and had the full charge of the ship. That the exception in the 6 G. 4. c. 125. s. 2. was inapplicable to this case; and, after alleging that by the 58th section of the same statute a penalty was imposed on the master of any ship who shall act himself as pilot, or who shall employ as a pilot any unlicensed person, it referred to the 55th section; and submitted, that by reason of the premises, and of the said statute, the owner of the *Christiana* was not liable for the amount of damage sustained by the barge.

Under statute 1 & 2 G. 4. c. 75. the Court of Admiralty is authorized not only to arrest a foreign ship, but to proceed to judgment in a case of collision. Protest of foreign owner overruled. But a duly qualified pilot being intrusted with the navigation of the vessel, the owner is exonerated under stat. 6 G. 4. c. 125. s. 55. which applies equally to foreign as to British ships. Foreign owner and bail dismissed.

On the part of the owners of the barge, it was alleged that the owner of the *Christiana* was amenable to the jurisdiction of this Court under the 1 & 2 G. 4. c. 75. s. 32. which declares, "That in every case in which any damage shall be done by any foreign ship or vessel to any *British* ship or vessel, barge, boat, or other craft, or any buoy or beacon in any harbour, port, river, or creek, and it shall appear on a summary application made to any Judge of any of His Majesty's Courts of Record at *Westminster*, or to the

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Judge of the High Court of Admiralty respectively, that such damage or loss has probably been sustained or arisen by the misconduct or negligence of the master or mariners of such foreign ship or vessel, then and in such case it shall be lawful for such Judge to cause such foreign ship or vessel, being in any harbour, port, river, or creek, to be arrested and detained until the master or owner or consignee of such ship or vessel shall undertake to appear and be defendant in any action which shall be brought for such loss or damage, and give sufficient security by bail, or otherwise, for all costs and damages if recovered as shall be directed and ordered by such Judge, if it shall, upon the trial of such action or suit, appear that such loss or damage shall have arisen from such negligence or misconduct as aforesaid, and in such action or suit, the person giving security shall be made defendant, and shall be stated to be the owner of the foreign ship or vessel doing such damage, and it shall not be necessary in any such action or suit to give any other evidence of the liability of such person to such action or suit than the production of the order of the Judge made in relation to such security."

The *King's Advocate* and *Chapman* in support of the protest. — It is alleged that the case is within the exception in the pilot act, 1 & 2 G. 4. c. 75. s. 32. But this section does not give the Court of Admiralty full jurisdiction; it only empowers the Court, upon a summary application, to arrest a foreign ship for security, and prevent her departure till bail be given, in order to enable the Courts of *Westminster Hall* to proceed to a decision upon the case: but bail gives no jurisdiction, and the statute leaves, in this instance, the general juris-

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diction as it stood before, liable to exception from the local position of the vessel. Another objection is, that the warrant issued in the ordinary form; whereas, under this section, it should follow a previous affidavit and application. A duly qualified pilot, however, being on board exonerates the owner. By 6 G. 4. c. 125. s. 55. it is enacted, "that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this act, when and so long as such pilot shall be duly qualified to have the charge of such ship or vessel." Here the vessel was in charge of a fit and competent pilot. *Bennet v. Moita*, 7 Taunton, 258.

Lushington and Addams contra.

The 1 & 2 G. 4. c. 75. s. 32. not merely enables the Court to take bail, so that the injured party may proceed at common law, but enables this Court to administer a full remedy; and any other construction would introduce a singular anomaly for which no precedent has been cited. The words "costs and damages, if recovered, as shall be directed and ordered by *such* Judge," must apply directly to the Judge who issues the warrant. It never could have been intended that an action should be entered against an individual at common law upon bail given in this Court. If warrants in these cases may not be extracted in the ordinary form the object of them may be defeated; for if the Judge should be absent how could an application be made to him? Any order of this nature

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would suspend, at least, the issuing of the warrant. And the question, whether any or what damage, must be for ultimate consideration.

That a pilot was on board is no cause of protest; for if the damage should proceed from the acts of the master and crew they would not be exonerated from liability: the statute, however, does not apply to foreign ships. In the *Carl Johan**, Lord *Stowell* decided that the 53 G. 3. c. 159. in which words, precisely similar to the 6 G. 4. c. 125. s. 55. were brought under his consideration, did not apply to foreign vessels. From analogy, therefore, it is to be inferred that it is not compulsory on a foreign ship to attend to the regulations of the pilot act, and to have a duly qualified pilot on board.

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Sir *Christopher Robinson*.— I should not have been surprised to have found a distinction as to foreign ships, existing on general principles, though I do not know of any formal authority to that effect. The question for my consideration is, whether the jurisdiction given by the 1 & 2 G. 4. c. 75. s. 32. is full and entire for the purpose of enabling this Court to give judgment on such cases, or whether it is only ministerial for the purpose of arrest and detention, and as adminicular to the institution of proceedings for redress in the courts of common law. This restricted interpretation is not the natural one on a subject of so much nicety and importance as the jurisdiction of a court of justice; nor would it be convenient for the purposes of

* Cited in the *Dundee*, HOLMES, Vol. I. p. 113.

justice. The terms of the statute are general: the thirty-first section deals with the general jurisdiction of the Court; and declares, that there shall be a concurrent jurisdiction between the Courts of *Westminster* and the High Court of Admiralty in cases of salvage rendered between high and low water-mark. The clause then adverts to the case of foreign ships, and directs "that they may be arrested by the Judge of the High Court of Admiralty."

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This power is given in terms of general reference, and without any restriction. As to the limitation suggested, it does not appear in what way the process of the common law courts would be engrafted on an arrest of a vessel by a warrant of this Court; and where bail would be taken under its authority. It is my duty to put the broadest construction on the jurisdiction assigned to this Court for the purpose of administering effective justice in the cases there provided for; and I shall not be disposed to do otherwise, till I am instructed by a superior Court as to the limitation so said to be imposed upon its jurisdiction by the statute. It has been argued, also, that the statute requires the application to be made to the Court on special motion; whereas the warrant in this instance was taken out in common form. It may, perhaps, be more proper that the Court should be applied to on the subject; but as this warrant has been served, the Court will not now supersede it, nor decline to act upon it.

On the point of exemption by reason of a pilot being on board, I think that is not strictly matter of protest; and, indeed, this form has been admitted to have been adopted on the ground of convenience: the terms of that statute (6 G. 4. c. 125. s. 55.)

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relate only to damage done by the neglect or incompetency of the pilot. It will not appear whether the injury alleged to have been done in this case is of that nature, till an opportunity is given to the other party of replying to that averment. Such a distinction was suggested in the case of *Bennet v. Moita* *, though not as a cause of protest; and such a defence properly introduced might avail under the authority of that case; for I should be disposed to act on the same principle, if no facts should be alleged on the other side to take off the general presumption that the pilot, being the person intrusted with the navigation of the ship, was the person to whom the injury arising from collision should *primâ facie* be attributed. That was the reasoning of the Court of Common Pleas in the case referred to, and applied to a foreign ship, on the construction of the 52 G. 3. c. 39. the basis of the 6 G. 4. c. 125., the statute now under consideration.

Another argument is, that the statute does not apply to foreign ships; a construction drawn from what passed in the case of the *Carl Johan* †; but the Court of Admiralty has always treated this statute as obligatory on foreign ships as well as on our own. And without referring to general principles, it is manifest that, from an absence of local knowledge, no ships can be more in want of pilots in the *Thames* than foreign ships. There are also several sections in the present statute that relate to foreign ships; and it would be disadvantageous to them if the general obligations of pilots, under the act,

* 7 Taunton, 258. *Ritchie v. Bowfield*, ib. 309.

† Cited in Vol. I. p. 113.

should be held not applicable to foreign vessels. There does not appear to be any solid ground for such a limitation. I therefore overrule the protest, and feel it my duty to intimate, that unless it can be shown that the cause of action arose in a manner not imputable to the pilot, the Court will admit the defence on the principle before adverted to, and will not proceed further in this case.

Note. — It was admitted that no such distinction could be suggested, and the Court dismissed the foreign owner and the bail.

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VESTA. THOMPSON.

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THIS ship, on a voyage from *Memel* to *London*, stranded on the *Gunfleet Sand* on the 18th of *November* 1827, and was not got off till the 16th of *December*. The salvage was effected by five boats and twenty-two men, employed during the whole of that period. The award of the magistrates at *Colchester* had allotted two thirds of the value of the ship; one fourth of the deals forming part of the cargo, and one third of the corn on board; giving altogether two fifths of the whole proceeds — about 1000*l*.

Lushington and *Addams* for the owner. — We object to the award on two grounds: 1st, That the amount of the whole sum given for salvage is too

a award of two fifths of the whole proceeds sustained; but the Court, objecting to a different rate of salvage for the ship and different parts of the cargo, as unusual and inconvenient, refused to allow the salvors' costs.

If the award of magistrates is generally a reasonable reward for salvage services, the Court will not disturb it in a trifling sum, merely because the apportionment should be in some degree objectionable; it being the duty of the Court to support such awards, as far as they are not excessive, nor inconsistent with general principles. An

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great a proportion. 2dly, That an apportionment has been made on a principle novel and inconvenient in practice, and likely to lead to unfair preferences. The allotment should be equal upon the ship and upon the cargo.

The *King's Advocate* and *Nicholl* contra.

The whole sum allotted for salvage is not excessive in reference to the number of men, and the length of the service, which was attended with great labour and hazard, and not without considerable privations, as the men were often ten hours without provisions or shelter. In the *Jonge Bastian*, 5 Rob. 322. two thirds were given. The apportionment was made on account of the greater danger and length of time attending the salvage of the ship than of the cargo, as the principal part of the cargo consisted of deals, which were buoyant, and could not easily be lost. It was then fair and equitable that the brig should bear a larger proportion of salvage than the cargo.

JUDGMENT.

Sir Christopher Robinson. — I have thought it necessary to examine the evidence minutely, in order to satisfy myself on the merits of the case, and the reasonableness of the general award; because, if that should appear to be justified by the circumstances of the case, the sum being trifling, the Court would not be disposed to disturb the decree on a small point that might be objectionable in the apportionment.

It occurred to me that the number of boats was larger than could be advantageously employed during so long a period; and it was rather a matter of surprise to me to find that means were not used

to tranship the corn, as it appeared to be a strong measure in salvors of this description to throw overboard the most valuable part of the cargo, above 900 quarters of grain. The Court is, however, perfectly satisfied on these points. When the master and crew went away they left the vessel under the care of Mr. Nixon and Mr. Billingsley of *Harwich*, the agents of the consignees or insurers; and, as the Court may suppose, of the owners of the ship: this would be the most natural and favourable presumption. A daily communication appears to have passed between the salvors and the agents; and, since no objection has been taken by them, it is to be presumed that every thing was rightly done, and to the best advantage. The same presumption applies to the throwing of the corn overboard for the purpose of lightening the vessel. The first quantity was thrown overboard before the departure of the master; and the measure appears to have been sanctioned by his authority, or by that of his agents. The case, therefore, is liable to no objection on that ground.

The services were performed with considerable labour and exertion, with great privations to the individuals, and with occasional risk. There was also a loss of the general occupation of the boats and men during the best part of the fishing season, which is called the stobart season. The award does not afford more than 3*l.* 10*s.* for each boat *per* day, and not more than 13*s.* 8*d.* for each man; and it appears that 6*s.* were paid to an occasional assistant. This alone induces me to think the award, though large and liberal, is not excessive. The value of the property was but small; the salvage, therefore, may be greater in proportion to the value

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than in large cases, without deviating from the rule and practice of the Court on that point.

In cases of this description, coming from the award of commissioners appointed by act of parliament to allot salvage on the spot, in order to save the time and expense of a regular suit, it is my duty to support the awards so far as they may be not inconsistent with the general principles of this Court, or chargeable with excess on comparison with the principles applied to cases of a similar kind in this Court. In this instance, the allotment is not beyond what this Court has been in the habit of giving. A case has been cited in which two thirds were given; and in the case of the *Courier*, decided in *July* 1813, under circumstances very similar to the present, a moiety was distributed under some settlement or arbitration, though the Court was inclined to think two fifths would have been an adequate remuneration. That ship was stranded about fifteen miles from the *Harwich* coast, and was finally deserted and went to pieces. The cargo, of the value of 9000*l.* for exportation, was saved by eighteen boats from *Harwich*, and by the exertions of their respective crews, altogether amounting to 116 men. Some agreement was made between the owners, their agents, and some of the salvors, by which a moiety was given:—"In my own judgment," said the Court, "I should not have decreed more than two fifths; but as one half has been given by agreement to one party, I shall not disturb it as to the salvors, and accordingly grant the same proportion."

In that case then there was an expressed opinion of this Court that two fifths might be given in cases of high merit: that is the general rate for

derelict; and if that case bordered on derelict, so does the present; and as the value in this case is less, I think it is a precedent on which the Court may safely pronounce, that the award now under consideration is not excessive. On the other point, I have not the same satisfaction in confirming what has been done by the commissioners: they have made separate allotments on the ship and on the cargo; on the ship, valued only at 366*l.*, they have given 245*l.*, or two thirds; while on the deals, amounting to 600*l.*, they have given one fourth, or 150*l.* No explanation has been furnished as to this distinction.

It is said that it might be made with reference to the difference of danger to which the property was exposed; but that would be a difficult criterion to be applied in most cases. The buoyancy of articles may vary in different places — in the sea or in the river; and on the high seas, the consequence may not be very different to the owner, whether the articles sink or float away. It might be adopted on a computation of the difference of labour employed in the constant attempts to float the ship, which were ineffectual for so long a time, and the comparative facility of floating the deals: but I do not think that would be a safe criterion in general cases. Suppose, for instance, a casket of jewels on board, and which might be saved with great facility; it could not in such a case be contended, that the salvors would only be entitled to a small gratuity for carrying it on shore. To uphold such a notion would lead to preferences in saving one part of a cargo before another. The more usual rule has been to make

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a valuation on the ship and cargo, and I think that would be the more convenient practice.

It is possible that the commissioners may have been guided by some distinctions that may prevail in some other cases ; but if there is such a rule, it cannot, I think, be safely applied to salvage cases, either by the commissioners, or by this Court. If the question, therefore, related to a sum of considerable magnitude, I should either have required further information, or have taken more time to consider this part of the award before I could have confirmed it with satisfaction to myself.

The principle of giving specific proportions of the property saved is an inconvenient rule in itself, and must lead to error, unless checked by proper attention to the adequacy of the remuneration so assigned, according to the circumstances of the particular case. In this instance it has prevented the Court from apportioning accurately the sum which it might think sufficient and proper to be given. It cannot now open the whole case so as to raise the salvage on the cargo from one fourth, which would be below the general rate. It would therefore be prejudicial to the salvors to reduce the allotment on the ship ; and if the Court were to reduce it to any intermediate proportion, the disparity would still remain as to the deals. I will not therefore, under the particular circumstances of this case, disturb the sentence on this point : but I do not approve the distinction : and as I do not confirm the sentence in principle, I cannot decree costs.

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THIS was a case similar to the *Vesta*. The ship had struck on the same sand on the same night: the services were of the same kind, and continued for fourteen days. The ship was not got off. The value of the goods saved was 9680*l.*; and the sum awarded was 3050*l.*, and 175*l.* to the *Oyster*, a separate boat. There were fifteen boats and sixty-seven men.

In an appeal from a magistrates' award in a case of salvage, their certificate of value under stat. 1 & 2 G. 4. c. 75. s. 9. even if not conclusive, is of great weight; and the Court, dissenting on no point from the award of one-third of the proceeds, affirmed it with costs.

The *King's Advocate* and *Nicholl* for the owners.

The salvors have very considerable merit, but the estimate of their services by the magistrates cannot be sustained. No effective measures were taken to preserve the cargo before the morning of *November 21st*. Up to that period only six smacks had been employed; the weather had then much moderated, and after the 22d the exertions of the salvors were not in the least impeded. The award is excessive; it amounts to a full third of the cargo saved, inclusive of the duty upon the tallow, the duties upon which the commissioners neither directed to be deducted, nor the tallow to be sold duty free. The salvage also given to the three men of the *Oyster*, who were only employed seven days, is greater in proportion than the remuneration to the other boatmen. Besides the award being excessive, it was made on a partial examination of the goods and an erroneous estimate of value. The original valuation by the tradesmen on the spot was 9680*l.* 9*s.* 6*d.*; while the affidavits place it at 7000*l.* It will, however,

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be contended that the value certified by the magistrates is the only value on which the Court can proceed. The 1 & 2 G. 4. c. 75. s. 9. directs that the certificate shall be received as evidence, but not as conclusive evidence of value; and the court of appeal is not bound by an erroneous valuation. Here the difference is more than 2000/. The award at *Harwich* proceeded on an estimate, of the bristles, from two samples out of thirteen; of the hides from weight, which had been much increased by water; and of the tallow, with the duties included.

Lushington and Salusbury contra.

The owners, in this case, are precluded from reviewing the estimate on which the salvage has been allotted. The mode of valuation is fair; it was ascertained by evidence before the magistrates, and assented to by all parties: if it had been improperly made, the agents of the consignees of the cargo should have interfered upon the spot; or, upon the appeal, have resorted to a commission of appraisement.* How is the Court to ascertain the true value of articles of which it can have no knowledge nor experience; and especially when the owners have taken the property into their own possession?

The statute makes the certificate of the magistrates, upon this point, final. If not, why is it directed to be transmitted? There is no distinction in principle between a valuation of this description, and goods taken on bail. The parties are bound in both cases: The *Betsey*, WINPENNY, 5 Rob. 295. The award includes all the expenses,

* See the *Oscar*, *infra*, 258.

damage to the boats, and a compensation for the loss of a valuable part of the fishing season. According to the established mode of sharing among these boats, each will take two shares and a half; so that, after all deductions, 28l. 14s. will be the amount of each share.

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COURT. — The Court observed, that if the words of sect. 9. of the act of parliament,* did not bear a pretty conclusive effect, the certificate of value would be almost nugatory; such valuation, being founded upon evidence furnished by the parties themselves on the spot, must, at least, be considered as more satisfactory than what was to be found in the present affidavits: It thought that the merits of the case were similar to those of the *Vesta*; and expressed its unwillingness to disturb an award which appeared to have been made on an accurate and full examination of all the particulars. It therefore confirmed the award; and as there was no point on which the Court dissented from the order of the commissioners, it was bound to confirm this award with the costs of the appeal.

Award affirmed with costs.

* 1 & 2 Geo. 4. c. 75.

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HAPPY RETURN. WOOLCOCK.

THE *King's Advocate* and *Addams* for Mr. *Davis*.
Lushington and *Dodson* contra.

JUDGMENT.

Sir *Christopher Robinson*. — This is a claim of salvage for services in recovering this ship and cargo. A previous question is raised in the act on petition, respecting the character in which this service was performed; it being alleged that Mr. *Davis*, the asserted salvor, acted only as agent, under power of attorney from the master; and that it is on that account not a case of salvage but of agency, in which the party is entitled to his commission of agency, but cannot come to this court as salvor. The Court is prayed accordingly to reject the claim for salvage, and condemn the party in the costs of the petition. On the other hand, it is denied that Mr. *Davis* acted solely as the agent of the ship, and not as salvor: for it is alleged, "he was not the appointed agent of the owners of the ship or cargo, nor did he ever consent to act as such, nor had he any credit from them, but acted solely as salvor under the power given by the master." It is further added in illustration of this position, that the appointment was expressed to be irrevocable, as not in the common form of agency, but engrafted on the character of salvor; that Mr. *Davis* acted at his own risk as to the expenses, and that the appointment from the master was taken principally to keep off other salvors. These are the several

The Court, upon the evidences, being satisfied that it was understood and sufficiently expressed that a person, appointed "true and lawful attorney, in the name of the Master, to use all possible means for the recovery of the ship and cargo," should act as agent, and that his claim for salvage should be controlled by that understanding: Held, that such character, nevertheless, did not wholly supersede the character of salvor, so as to exclude the jurisdiction of the Court of Admiralty. The Court, out of a value of 4,50*l.* gave, together with costs, 225*l.*, in addition to 81*l.* 15*s.* 6*d.* for disbursements.

positions drawing to a point, which is sufficiently abstruse and subtle as to the essential or predominant character of this service; but admitting, I think, on both sides, "that the service was rendered under a power constituting Mr. *Davis* agent to effect this service," whatever may be the consequence of such an appointment: and the question for the Court to determine is, whether the ordinary principles on which this Court allots the reward for maritime salvage were controlled, or intended to be controlled by this appointment.

On the declaration of intention there is much contradictory evidence, which I will state briefly; meaning to pass over, without observation, many of the facts that have been introduced into the affidavits. For if the inferences arising from the instrument, and the immediate communications of the parties, do not decide this question, it will be in vain to look for a satisfactory test in more remote incidents, which may be equivocal, and might equally have attended the transaction in either view of the case. The power of attorney appoints "*Robert Davis of Cowes*, true and lawful attorney, *irrevocable*, in the name of the master and in his behalf, to use all possible means for the recovery of the ship and cargo, and to perform all lawful acts necessary concerning the *premises*." The vessel in her voyage from *Pensance* to *London*, had struck on a rock near the *Needles*, and sunk, on the 11th of *October 1827*. The master says in his protest, "that he was solicited on the same day, by a clerk in the house of *Meinholt, Davis, and Co. of Cowes*, to employ the said house in the agency for the ship; and he did so appoint *Davis*, that others might not interfere." *Brown*, the clerk says, "that he offered

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to the master his services on behalf of his employers, and recommended him to go to *Cowes*, and consult them to know what was best to be done, which he did."

This is the origin and commencement of the undertaking. The house immediately, on the same day, the 11th of *October*, wrote to Mr. *Fox*, as a clerk (apparently known to them in *London*) in the house of *Bolitho* and Co., the brothers of the owners of some tin forming the principal part of the cargo, advising them of the accident, and "that they had been applied to by the master for assistance, which they promised to render in their endeavours to save as much of the property as possible."

The answer to that letter appears to come from the house of *Melhuish* and *Gray*, consignees of part of the cargo, and underwriters. They adopt *Fox* to act for them, and in that character a letter of introduction to *Meinholt* and Co. is given by them to Mr. *Fox*. From this letter, however, Mr. *Fox* acquires only a more general authority to act for all parties: it is not to be understood as being his only, or principal introduction to *Meinholt* and Co., for they had previously addressed their letter to him. The letter of *Melhuish* and *Gray* expresses the reliance of the writers that the assistance will be given, and more particularly, "that the charges thereon will bear that reasonable appearance which is usual with your different establishments." This is all the documentary evidence, and every thing passes between the two houses, without reference to the special claim of any individual.

Mr. *Fox* swears, that on his arrival he stated to Mr. *Davis* that he came from the underwriters, and the reason for sending him was that all claims

for salvage should be avoided, and whatever should be done for recovering the vessel and cargo should be considered a matter of labour, and only paid for accordingly; to which *Davis* readily acquiesced, and frequently expressed to the deponent, that he felt much gratified that the business had been committed to his house of trade, as it gave him an opportunity of convincing the gentlemen at *Lloyd's* that he could act on such an occasion with honour and integrity."

Mr. *Rock*, a disinterested person who accompanied Mr. *Fox* as his friend and companion, confirms this statement; and the account given by Mr. *Pearce*, who had come from *Penzance*, substantially agrees with it. It is contradicted, however, by Mr. *Davis*, who swears "that Mr. *Fox* did not, on his arrival, state to him that *all* claims of salvage should be avoided, and that *all* service should be paid for as labour, and that on no other conditions should persons be employed to save the ship and cargo; or that he, Mr. *Davis*, readily acquiesced in such arrangement."

This is such a direct contradiction of a simple fact, on the oaths of persons all apparently respectable, that the Court hardly knows how to deal with it. It must endeavour to find out some test to be derived from the nature of the things admitted to have been done, and not disputed; for, on the mere balance of credit it would be very unwilling to found any conclusions, and it would wish to avoid the painful task of entering minutely into such considerations.

It is agreed on both sides, that other salvors were to be excluded, though it does not appear in what terms that understanding was expressed. It would

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not arise, necessarily and absolutely, from the privileges of a first salvor ; according therefore to the accounts given of this understanding “ as to other salvors,” it is natural to suppose that some conversation passed on the subject. If that is assumed, it is also natural to suppose that the intention of the owners and underwriters would apply to all claims of salvage, as they would otherwise obtain very little advantage ; and it may be expected that any distinction set up on behalf of Mr. *Davis* should have been noticed by him, and that proof should be given to that effect. Mere silence on such a point would confirm the representation of the owners ; more particularly when it is clear that some anxiety as to charges was expressed by them in the letter of the 12th of *Oct.* The rules of law for the interpretation of such an appointment are only those of common sense and good faith. They prescribe generally, “that a procuration or order ought to be executed fully according to the extent or bounds of the power given. If it marks precisely what is to be done, he who accepts it ought to keep to what is prescribed in it. If it be indefinite, he should set such bounds to it, or give it such extent as may reasonably be presumed to be agreeable to the intention of the person who grants it.”* Mere silence therefore on such a point would only confirm the representation of the owners ; and on this principle the act of Mr. *Davis* in clothing himself with the legal character of salvor, by taking out a warrant of this Court on the 19th *October*, before any salvage service had been performed, ought to have been communicated to the owners, if it was intended to

* *Domat on the Civil Law*, book i. tit. 15. s. 8.

be made the foundation of an adverse title against them ; whereas if it was intended only to keep off other salvors, it would accord with the intention of the other party, and would be the best excuse that could be offered for this great irregularity, either to this Court or to the owners.

It is clear also, I think, that some conversation passed between Mr. *Fox* and Mr. *Davis* relating to the expenses, and the accounts of charges and disbursements. Mr. *Fox* says " that he made frequent applications to Mr. *Davis* for an account of his disbursements and charges, and such accounts were promised but never delivered." Mr. *Davis* says " that when Mr. *Fox* was going to *London*, (which was about the 25th of *October*,) he desired him to make out an account of his expenses and charges, and that he would accept the same for account of *Bolitho* and Co., the shippers of the tin ; but the appearer told him he could not make out an account or demand, as the salvage was not completed." He further says, " that a few days afterwards Mr. *Fox*, on his return, informed him that when in *London* he had mentioned his promise to settle these accounts to some of the underwriters, who told him that he must do no such thing as it was a case of salvage, or to that effect." Mr. *Fox* denies that he ever made this last declaration.

The sense in which Mr. *Fox* promised to settle his accounts, is opposed to the notion of eventual proceedings for salvage, in which the accounts would be to be rendered in this Court. But the answer which Mr. *Davis* represents himself to have made, " that he could not make out an account or demand as the salvage was not completed," does

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not necessarily imply that he meant to stand on his legal claim for salvage. This again is, I think, another occasion on which it would have been natural that such a right should have been asserted, if the intention was really entertained.

I abstain from adverting to the more equivocal incidents that have been referred to on one side and the other. The term *irrevocable* in the appointment affords no solid inference. It could not operate, I conceive, as an irrevocable appointment strictly; and I rather understand that circumstance to be adverted to only as showing that it was not an ordinary agency that was so assigned, but for a specific purpose. There is as little, I think, in the circumstance alleged, that Mr. *Davis* was not the constituted agent of the owners of the ship or of the cargo; or that he had no security for his expenses. The power which the master had to pledge his owners or their property in their own country was very limited, and confined to cases of necessity for the preservation of the property committed to his care. But if he had the power to bind the owners to any thing by this appointment, it would be to the obligation of paying all reasonable expenses incurred, such engagement being essentially reciprocal.

If any other notion had been entertained, some enquiry would have been made as to the value of the cargo before Mr. *Davis* would have proceeded to embark in the service at his own risk. So early as the 25th of *October*, the conversation with Mr. *Fox* shows that the liability of the owners and underwriters for all reasonable expenses and charges was admitted by him, and that is not in any manner controverted by Mr. *Davis*.

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On these grounds, without going into further particulars, I am of opinion that on the part of the owners and underwriters, it was intended that the service should be intrusted to Mr. *Davis* in the character of agent, and that the claim for salvage should in some degree or other be limited and controlled by that understanding. I think also that such intention was sufficiently expressed, and that Mr. *Davis* ought to have put that interpretation upon it.

Then what will be the effect of such an appointment? It is not contended that it will be an absolute bar to the jurisdiction of this Court, and I think it could not be opposed to any recourse to the jurisdiction of this Court, that might be necessary in a case of bankruptcy or any such contingency, to support a preferable claim to salvage by proceedings *in rem*. In a case which occurred in the King's Bench*, the services of persons employed by the owners or masters of ships in distress were held to be out of the special provisions of the acts of 12 *Ann. st. 2. c. 18.*, and the 26 *G. 2. c. 19.*, as those acts then stood, with respect to references to magistrates.† But Mr. Justice *Lawrence*, in recommending the extension of those acts to salvors employed by the owners, suggests the propriety of reserving certain cases in the Court of Admiralty and the courts of common law; implying the opinion of that eminent person that the character of agent did not necessarily supersede *that* of salvor, so as to exclude the jurisdiction of the Court of Admiralty. On that point I entertain no doubt; though, if cases should occur more

* *Baring v. Day*, 8 East, 75.

† See the 48 *Geo. 3. c. 130.* 1 & 2 *Geo. 4. c. 75.*

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proper to be submitted to a jury, on disputed facts affecting the character of parties or the customs of trade, and that means should be used to put the question in a course of trial at common law, I might on proper application be disposed to suspend proceedings here for that purpose. But after this case has stood so long on bail, taken as in an ordinary case of salvage, I think it is the duty of this Court to endeavour to bring it to a beneficial conclusion, by making a positive decision upon it.* With this view I have looked to the evidence on the services that have been performed. They are considerable in the ingenuity and activity employed in contriving or superintending the measures which were adopted for raising the ship, and extracting the cargo of tin, by tongues or screws, from the hold of the vessel. As much, however, as half the cargo was extracted in this manner by another person, by an instrument which he had invented for that purpose. The service was performed not very far from Mr. *Davis*' usual residence. There was no peril or danger encountered by him; for, as to the accident which befel him on one occasion, in being thrown into the water by the motion of the vessel, it happened to others also, who have received no additional remuneration on that account. And when it is asked, "whether this is a charge which persons can be expected to encounter for mere agency," I can only say that others have encountered it on this occasion even without agency. The services continued from the 11th of *October* to the 6th of *November*; with only such intermission as was oc-

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* In the *Spring*, HAYNE, the Court adopted the same course, upon a claim of salvage for the unlading and housing of goods from a wreck brought into *Pagham Bay*.

casioned by the weather; and the services are admitted to have been meritoriously performed.

Reference was made in the argument to the case of the Lord *Cranstoun*,* which was a valuable West Indiaman wrecked off *Beachy Head*; and in which the cargo was recovered by labour from the shore under the management of Mr. *Stone*, and Mr. *Hudson*, of *East Dean*. I have looked at the papers of that case, and it bears a very general similarity to the present.

Mr. *Stone* was described in that case as deputy vice-admiral, and agent to *Lloyd's*, and Mr. *Hudson* as ship agent; and it is stated in their affidavits, and therefore admitted by them, "that the master deputed them to do the best in their power to save the cargo and stores of the ship for the benefit of all parties concerned." The persons who worked under them (amounting to one hundred and thirty-six in number), and a steam vessel, were to be paid not as salvors, but for the work done by agreement. The services were performed during a period of fourteen days from the 7th of *December* to the 21st. The expenses were large; but they were allowed by the owners, and no dispute arose respecting them. In this case, the expenses are of nearly the same amount, above 1000*L.*; but they are strongly objected to; and, if it is desired, I think I ought to refer them to the registrar and merchants to report upon them, before I proceed finally to allot the remuneration, as the fidelity of that part of the transaction may materially affect the merits. No tender has been made, neither have the parties drawn towards each other at all in the proposal of any rate of remuneration that may appear reasonable to

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them. Being left to work it out by myself between parties, bearing apparently considerable animosity towards each other, I shall keep as close as I can to what I find to have been done in the Lord *Cranstoun*. The deputation in that case was, I think, very much the same as the power of attorney in this. I see no reason why Mr. *Davis* should stand in a better situation than the deputed agents in that case; nor why the owners or underwriters should object to the settlement of this present case, in this Court, in the same manner as was done there on a similar claim of persons admitted to be the agent of the underwriters, and the deputed agents of the owner. The labour, exertion, and hardship suffered in that case, were fully as great as in the present, though the time was shorter. I find that the whole sum decreed to be paid on that case was 1500*l.*, including the expenses, which were 1146*l.* and were not objected to by the owners. The value of the cargo was described as 7000*l.*; the sum of 364*l.* was there allotted. In this case, the value is computed at 4500*l.* by agreement; and if the parties do not agree, I shall adopt the principle which was acted upon in the Lord *Cranstoun* for my guide: and the case will stand over till I am further informed upon it.

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On a subsequent day, the cause came on again on the registrar's report, in which 815*l.* 15*s.* 6*d.*, being all the disbursements claimed, (except a sum of 92*l.* on several small articles, of which the Court ultimately allowed some part for additional boat hire,) were reported to be due. The Court expressed its satisfaction at finding that all objections on that

part of the case were now removed: and, advertising to the rate of remuneration allotted by the Court in the *Lord Cranstoun*, awarded 225*l.* as a gratuity for the services rendered by Mr. *Davis*, together with his costs.

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ON 22d of April, 1828, a monition issued against

Sir *Lawrence William Halstead*, late commander-in-chief of H. M. ships on the *West India* station, and against his agent, to bring into the registry 238*l.* (being one eighth of a certain salvage award) received by him as the flag-officer's share, or to show cause to the contrary. The money being brought in, it was alleged, in act on petition, on behalf of *Francis Leardet*, commander, and the rest of the officers and crew of H. M. schooner, *Lion*, that, in October 1824, the schooner was despatched by order of Admiral *Halstead* to cruise against pirates; that, whilst cruising in pursuance of such orders, *Leardet* was informed of pirates being off *Cape Antonio*; and his own crew being insufficient to surround them, and cut off their retreat by land as well as by sea, he applied to the commander of the U. S. schooner, *Terrier*, for his co-operation; and the two schooners sailed together to *Cape Antonio*, and on the 5th of November, they, after several skirmishes with, and whilst engaged in pursuit of, the pirates, dis-

The provisions 6 G. 4. c. 49. and the order in council of Sept. 1825, do not apply retrospectively to cases of salvage or rescues from pirates made and adjudicated upon before the passing of that act; and the Court of Admiralty has no power of its own authority to adopt the principle of constructive salvage. The Court therefore rejected the claim of the admiral to share in such part, as if that statute and order in council applied, would belong to him in the case of a rescue of a British vessel.

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covered a *French* merchant vessel, the *Calypso*, lying in shoal water without any person on board: that the *Calypso*, with a cargo of coffee, had been seized by the pirates some days previously, and all the coffee landed and concealed in the woods at some distance from the shore: that the crews of the schooners with great difficulty and danger got off the *Calypso*, and recaptured the coffee, which were afterwards carried by the *Terrier* to *Key West*, an *American* settlement on the *Florida* shore; where, under the wreck and salvage laws of the *Floridas*, eighty *per cent.* of the value was awarded to the salvors, in moiety. That the *British* schooner's moiety was distributed by Admiral *Halstead's* secretary, as agent, who reserved one eighth as the flag officer's share of the salvage. And it was further alleged, that no flag-share or proportion is payable by law to the admiral or flag-officer, on account of salvage acquired by the rescue of ships and cargoes belonging to foreign nations from pirates.

On the part of Admiral *Halstead*, the 6 G. 4. c. 49. s. 1. & 2.* and the Order in Council of the 30th of *September*, 1825, were in part set forth, by which order "His Majesty did declare that the produce of all ships, vessels, boats, goods, and other property of, and taken from, pirates, shall be paid, divided, and distributed to, and amongst

* By the 2d section, the distribution of the reward, payable in respect of pirates or pirate vessels taken or destroyed, is directed to be made to and amongst such persons and in such manner, form, and proportion as His Majesty by any Order in Council shall declare. The 3d section, on which the judgment in this case principally turns, is recited, *infra*, p. 214.

such persons, in such manner, form, and proportion, and under such regulations as are by H. M. Order in Council of the 23d of *June* 1824, expressed and directed with respect to the distribution of the produce of seizures made by the officers, seamen, and marines of H. M. fleet under the laws relating to H. M. revenues of customs and excise.”*

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And it was alleged that by virtue of the order in council of the 23d of *June* 1824, a flag-officer is entitled to one of three eighth parts of all seizures thereby given to the captain of any of H. M. ships making such seizures, and being at the time under the command of a flag-officer.

In *reply*, it was alleged, that the 6 G. 4. c. 49. referred only to the recapture from pirates of ship and goods, the property of *British* subjects.

Lushington for Captain *Leardet*.

The *King's Advocate* and *Phillimore*, *contra*.

JUDGMENT.

Sir *Christopher Robinson*. — This is a question relating to the interest of the admiral on the *Jamaica* station, to share in a sum awarded to the captain and crew of one of H. M. vessels under his command for recovering a French ship and cargo from pirates. It is an incident in the case, that the salvage was awarded by an *American* court; but nothing arises from that circumstance which will materially affect my judgment on the question of distribution which has been submitted to me, and which must be considered as if the pro-

* These Orders of Council were revoked on the 13th of *July* 1827.

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perty had been brought to adjudication in this Court.

I think it proper to observe, however, that it would have been more correct if the *French* vessel had been brought for adjudication to an *English* port. The commander of the *British* vessel appears to have been the principal taker, with whom the enterprise originated: and he was acting under the orders of his superior officer. The claim of the owners of such property to restitution is specially provided for in many treaties *, and might be affected by the relations subsisting between the country of the owner and that of the recaptor.

One consequence that has attended the carrying of the vessel to a port in *Florida*, has been the deduction of so very large a proportion of the property as eighty *per cent.* in the award of salvage, which would not have happened under the decision of a *British* court. At the same time, as the money has travelled into the possession of the agent of the admiral, and the admiral has been made acquainted with the circumstances of the case, and has not, so far as I am informed, expressed any disapprobation of the conduct of Capt. *Leardet* in this particular, I may presume that there were circumstances of necessity or overruling convenience that justified the act.

In point of jurisdiction † it is undoubted, that all maritime nations have that common interest in preserving the safe navigation of the seas, that will authorise their respective courts of

* Treaty of *Utrecht*, Art. 35., and Treaty of Commerce with *France*, A.D. 1786. Art. 39.

† *Two Friends*, 1 Rob. 275. *Hercules*, PARMA, 2 Dod. 368.

admiralty to entertain, occasionally, questions which relate to the acts and to the interests of foreigners, under circumstances that bring the cases within their local jurisdiction, and more particularly in a case like the present, in which individuals of the adjudicating country may be parties. It will be my duty therefore to proceed, on the reference which has been made to this Court, as if the property had been brought within the jurisdiction of this country ; and on the same principle that would have been applicable to it at the time of the recapture, unless it should be shown that there has been any rule subsequently established by due authority that will affect it retrospectively.

The act on petition proposes such a rule to the Court in the statute of the 6 G. 4. c. 49., and in the Order in Council that issued in *September 1825*, in pursuance of the provisions of that act. On the other side it is said, that this is not *British* property, and on that account not within the provisions of the statute. But I am not prepared to decide the question on this ground. It has appeared to me that a previous question arises, — whether the clause of the act of parliament, that relates to salvage, can be applied retrospectively even to *British* property ; and if it should be the result of my decision that it cannot, *a fortiori* it will not be applicable to this case of foreign property ; and I may forbear to express any opinion how far the right of the admiral might virtually, or by the discretion of this Court, be extended to foreign property, under circumstances in which he would be clearly entitled to share in *British* property so recaptured. I will therefore, in the first place, consider the terms of the statute. It recites the

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Quære, whether the right of the admiral under 6 G. 4. c. 49. to share in salvage for the rescue of vessels from pirates extends to foreign ships.

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expediency of giving encouragement to H. M. ships to attack and destroy pirate vessels, and gives bounties for every pirate secured or killed, or on board at the beginning of the attack. It is well known that, at the termination of the hostilities in *Europe*, and during the unsettled state of the *Spanish* provinces which followed that event, great irregularities were committed by lawless associations of men, acting either with assumed commissions, or without commission, in the piratical capture of merchant vessels of all nations in the *West Indies*. Instructions were given to our cruisers respecting them. Many were brought to justice; and in that service great perils had been encountered by *British* sailors, previous to the date of this act of parliament. The act of parliament, therefore, provides by the grant of a bounty for the remuneration of persons engaged in conflicts with pirates since 1820; and proceeds to direct the distribution of the bounty according to the regulation of any Order in Council that should be issued by his Majesty. All this might well be done retrospectively, as it was matter of grant in which no previous rights existed, and there would be no injustice or inconvenience in distributing the bounty according to the opinion which the government might entertain of the claims of the different members of a combined force employed in that service.

The third clause of the statute * relates to salvage rendered to *British* ships and cargoes; and, in substance, enacts, "that if any ship, vessel, boat, goods, merchandize, or other property found and taken in the possession of pirates, shall be

* 6 G. 4. c. 49.

duly proved and adjudged to have belonged to, and to have been taken from, any of his Majesty's subjects, then such vessel or goods shall be restored, to the former owner or proprietor, on payment of one-eighth of the true value, in lieu of salvage, of such ship and goods respectively; which money shall be distributed according to the regulation that his Majesty may be pleased to appoint for the distribution of the goods and property of pirates."

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The Order in Council issued in pursuance of the act: and directs, that the rules and regulations before established for revenue seizures shall be applied to the goods of pirates; and as salvage is to be distributed by the same rule, and as the admiral shares, according to these regulations for revenue seizures, there will be no doubt as to his interest in salvage accruing subsequent to the act. But the words of the clause relating to salvage are all prospective, — they speak of cases *to be* adjudicated in some competent court; whereas this case had been already adjudicated: they direct the salvage to be awarded by a decree of the same Court; whereas this salvage had actually been awarded before the date of the act.

Similar observations apply also to the rate of salvage fixed by the act, and are, in that respect, perhaps, still more stringent. In settling the rate of salvage at one eighth, the legislature may be supposed to have reduced the probable salvage that would have been decreed by the authority of the Court. If a greater proportion had been given; it would be impossible to recall it, as it would be distributed: or if a smaller proportion has been given by the Court, the property would have gone away; and it would be equally impossible to in-

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crease it. There is therefore a material difference between cases of bounty and salvage. The legislature must be presumed to have known the actual state of the law on this subject, which existed previous to the act, and is as ancient as the jurisdiction of these courts. It must have known, that in all cases of salvage occurring between 1820 and the time of the act in 1825, the prompt administration of the laws, which is the first duty of all courts, would necessarily have placed such cases out of the reach of retrospective provisions; and the subject matter of that clause, no less than the terms in which it is expressed, repels the supposition that it could be the intention of the legislature to apply that clause retrospectively.

It might, however, be different with respect to the distribution of the goods of pirates, because they were matter of grant, and might therefore, without injustice or inconvenience, be governed by retrospective regulations, in the same manner as any particular mode of distribution might be embodied in the terms of the grant. I make this observation, to obviate an objection urged in the argument, that the construction suggested by the Court respecting salvage might prejudice the interpretation of the order. I wish to guard against any such inference. My business is only with the clause relating to salvage in the act of parliament: and it would not be inconsistent that the order to be issued respecting recapture from pirates should be adopted prospectively for salvage, notwithstanding that the order might, with regard to pirates' goods, be drawn in terms of retrospective operation as to them.

Another observation urged in the argument is,

that as the act embraces two objects, it would be natural to presume that it was intended to operate from the same time as to both. The effect of this observation will depend on the terms of the several clauses, or the necessary implication arising from them; as it could not be denied that a different commencement might be assigned to the different parts of the same act, if such intention was sufficiently expressed. And it does appear to me, that both the terms of the clause relating to salvage, and the necessary implication arising from the nature of the subject, support the construction that it cannot have a retrospective operation.

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In the argument, some suggestions were offered as to what might be the proper rule of distribution independent of this statute: and as to the power which the Court might have to adopt, by its own authority and discretion, the distribution established for revenue seizures. Different analogies were presented to the Court as to the nature and character of this service. On the one side it was said to be of the nature of civil salvage merely; on the other, it was represented as more nearly allied to military salvage: and different rules of distribution were said to be applicable to it, according as the Court might be disposed to ascribe to it one or other of these characters. But I doubt whether these services are essentially different, and whether they are not to be referred to one common origin, which takes away the effect of this distinction. It will be found, I think, that both these forms of salvage resolve themselves into the equity of rewarding spontaneous services, rendered in the protection of the lives and property of others.

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This is a general principle of natural equity : and it was considered as giving a cause of action in the *Roman* law ; and from that source it was adopted, by jurisdictions of this nature, in the different countries of *Europe*. This is the account which Sir *William Wiseman*, who was judge of this Court, gives of the origin of salvage. Referring to the title in the *Digest* *, he says, “ Upon the equity hereof is that proceeding in the Admiralty Court clearly justified, whereby, if a ship, being set upon by pirates or by enemies, shall be rescued by another ship seasonably coming to her rescue, it charges the ship that is then redeemed with salvage money to the other that did so endanger herself to preserve her ; that recompense being but in lieu of all damages thereby sustained, and for future encouragement to others to fight in the defence of those that they see assailed.”

All salvage, whether civil or military, is founded on the equity of remunerating private and spontaneous services rendered in the protection of the lives and property of others.

Considering all salvage, therefore, to be founded on the equity of remunerating private and individual services, a court of justice should be cautious not to treat it on any other principle. The public mischief of piratical associations may be different according to circumstances, and require different measures to repress them ; and it may belong to the state to establish rules of public policy respecting them. But the Court cannot safely introduce other persons to share with the recaptor on constructive grounds, without danger of increasing the salvage, to the prejudice of the owner ; or of diminishing the reward, to the prejudice of the actual salvor.

For these reasons it has appeared to me to be

* *Dig. lib. 3. tit. 5.*

† *Law of Laws, p. 90.*

unnecessary to proceed further to enquire what might be the effect of any instances that could be collected from the practice of the navy. No adjudged cases have been produced; and it does not appear probable that any could be found. One or two instances had occurred on the *Jamaica* station, but did not amount to much when they were accurately explained. In the *Charles Philippe*, in 1819, Sir *Home Popham* had shared: but the recaptor has now stated that he was not cognizant of that claim at the time when the payment was made by the agent; and that he acquiesced afterwards, on consideration only that Sir *Home Popham* was dead; and that he was unwilling to institute legal proceedings to obtain the repayment of the share so paid, against his widow and family. There had been another case also in the time of Admiral *Rowley*, in which the recaptors were advised to resist the claim: but the Admiral insisting on his right, they acquiesced. It is to be observed also, that the prevailing opinion of the Bar was against such a claim: and it may be inferred from thence that the experience of gentlemen, acquainted with the practice of this Court, did not suggest any principles on which such a claim could be established, independent of authoritative regulations; and that no cases had been brought forward that would have the effect of controlling or altering the general principle.

I must also refer to what was done in the courts of common law on a class of cases not very dissimilar, as arising out of a perquisite of service in the allowance of freight for the carriage of bullion in H. M. ships. The admirals of stations had usually shared in this perquisite, and this practice had

CALYPTO.

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1828.

CALYFRO.
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 1826.

received the tacit approbation of the Court in the case of *Donnelly v. Popham* *, and in other cases, in which it was assumed and admitted that the flag share was due to the admiral; but the question then was only, whether particular persons were entitled to rank as admirals.

In *Montagu v. Janverin*, in 1813 †, the right of the admiral was resisted: and the Court of Common Pleas held, that no authority could be attributed to such instances of silent acquiescence in the practice of the service, as they might easily be accounted for in various ways: and finally that Court decided against the admiral's claim. The authority of that decision continued to govern such cases till 1819, when the 59 G. 3. c. 25. was passed, empowering his Majesty to make regulations for the distribution of freight money, and a rule of distribution, including the Admiral of the station, was established for all cases which had happened since the passing of the act. So, in the change which was introduced into the distribution in revenue seizures in 1816, the Order in Council was held to apply only to cases happening subsequent to the act.

On these grounds I do not feel that this Court can properly proceed to adopt any such extended rule of distribution, merely on the ground that it may have been established for other cases. It must be extended to each particular class of cases by competent authority: and I am of opinion that the Court does not possess that authority. Having before said that the act of parliament of 1825

* 1 Taunt. 1.

† 3 Taunt. 442.

does not, in my judgment, apply to this case, which happened in 1824, I think I am not authorized to adjudge the sum in question to the Admiral. It will, of course, therefore, remain to be distributed among the actual salvors.

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1828.

JUPITER. CROSBIE.

January 29th,
1829.

THIS was a suit for seaman's wages, in which the claim was rejected upon the effect of the evidence in support of the owner's defensive allegation, pleading a forfeiture of wages by reason of desertion.

Dodson for the mariner.

Haggard contra.

JUDGMENT.

Sir *Christopher Robinson*.—This is a case of wages brought by *Smith*, a mariner who had sailed in this ship, in *February*, 1827, to the *West Indies*, and ultimately to *Jamaica*, where the vessel lay from *April* to *August* waiting for a cargo. On the 10th of *August* certain circumstances occurred which are represented by the owner, in his plea, to amount to desertion, or wilful disobedience; while, on the other side, they are represented to have discharged the mariner from further service, as amounting to a dismissal by the mate, who was

A mariner, having at *Jamaica* quitted the ship by order of the mate, applied to the master, who was on shore, for his discharge. The master refused, and ordered him to return to his duty. The mariner, however, engaged in another ship. Such conduct is desertion, working a forfeiture of wages.

JURMAN.
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 1829.

the commanding officer on board in the absence of the master on shore.

The question then is, whether the mariner quitted the vessel under justifiable circumstances, or in such a manner as will subject him to the forfeiture of wages then due. It is a question of importance to the individual, as it affects the earnings of several months, and it is also of great importance to the interests of navigation, since it involves consequences which may frequently occur, and on which the safety of the vessel and the success of the voyage may depend.

It is admitted, that, if bad weather had come on, the vessel would have been in danger of being lost for want of a stronger crew, as several of the mariners had left the ship from illness and other causes. It is manifestly of the greatest importance to the trade of this country that the duties for which mariners contract should be substantially performed, and not be rashly or wantonly abandoned: at the same time, it is the duty of the Court to protect mariners from oppression or injustice, and even from the effect of error leading to acts that might not be strictly justifiable, if they should appear to have been occasioned by unjust provocation or violent conduct on the part of those in command. With these observations I proceed to examine the evidence.

The summary petition, after a general averment of hiring and of service up to the 10th of *August*, sets forth, — “ That the mariner, being on shore, in the boat with the mate, had gone away, with his leave, in order to discharge a debt; and that, in his absence, the boat put off to the ship sooner than was intended, in consequence of seeing

a boat approach her with part of the ship's cargo." This fact is not otherwise material than as accounting for his first absence. The mariner, it appears, returned to the ship shortly after the rest of the crew had dined and received their allowance of grog; when, as it is alleged, "the mate very much abused this man *Smith*, and told him to leave the ship; that he went below to get his dinner, when the mate again abused him, and ordered him to quit the ship; that *Smith*, however, as soon as he had finished his dinner, went to work, and shortly afterwards asked the mate for his allowance of grog, which the mate refused, and again ordered him to quit the vessel; that he thereupon went below, packed up his clothes, and finally went on shore." According to this statement, the mate ordered this mariner on shore three several times in the space of a few minutes: the first time, it would appear, in reference to his staying behind on shore—of which no notice is otherwise taken; the second time, without any cause assigned; and the third time, on the mere asking for his grog, and without any improper or disobedient behaviour whatever on the part of the mariner.

The summary petition goes on to state, what is the most material part of the case; as these repeated dismissals are not relied upon as amounting to an absolute and final dismissal. It alleges "that the man attempted to return to his duty, but was again prevented by the mate, who refused to receive him on board; and that on the following morning *Smith* met the captain on shore, who asked him, 'what he was doing there,' and on being informed that the mate had discharged him, he desired him to return to his duty, and he ac-

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cordingly returned the next day; but the mate again refused him permission to come on board, and upon such refusal he returned again on shore: that on this occasion the master was on board, and heard the mate refuse to receive the mariner into the ship."

On the part of the owners, a defensive allegation contradicts this whole statement, and pleads, "that the mariner, on being ordered to return to his work, after dinner, declared, 'he would not work till his grog was served out to him,' and that the mate replied, 'If he would not work, he should leave the ship;' and that, on the next day, when the master ordered him to return to his duty, he positively refused; and that he did not at any time return, or offer to return, to his duty."*

In examining the evidence, I shall advert, in the first place to the witness *Merchant*, who is most favourable to the mariner, and is represented to have been his friend, and to have encouraged him in his contumacious behaviour; and if the case rested on his evidence alone, it would not be found to sustain the statement of the petition, either in terms or in substance. He says, "that *Smith* returned to the ship after dinner, and went immediately below, to eat what had been put aside for him; that after about a quarter of an hour the mate asked *Smith*, 'if he was coming to work, as the crew were taking in cargo.' *Smith* said 'he was, as soon as he had

* On the admission of the allegation the Court rejected two letters (written by Capt. *Crosby* to his owners immediately after *Smith* had quitted the ship) informing them of *Smith's* desertion.

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taken his dinner;’ that in about twenty minutes he had finished his dinner, and went to work in heaving up a hogshead of sugar, which was about as high as the gangway of the *Jupiter*; that *Smith* then asked the mate for his allowance of grog, which the mate refused, telling him he might go to hell; that *Smith* then asked permission to take his clothes and things away with him, and finally quitted the vessel; and that on the next day, *Sunday*, upon returning to the ship, in obedience to the master’s orders, the mate refused to admit him on board.” This witness admits that *Smith* did not take his clothes with him; and he denies any conversation having passed on the *Sunday* on the subject of a payment for a hat which is spoken to by *Peterson*, the other witness examined in support of the mariner’s petition.

Peterson’s account is,—“that *Smith*, upon coming on board on the 10th of *August*, and finding that the grog had been served out, went immediately to the mate, who was walking the quarter deck, and asked for his grog, the usual time for its being served out having expired; that the mate refused to give it to him then, and said, it was time for him to work; but that *Smith* said, ‘he would not work, unless he had his grog,’ and the mate told him, ‘if he would not work he was to leave the ship;’ that *Smith* then fetched his things, and finally quitted the vessel.” This witness, in answer to an interrogatory, admits, “that the mate did not make use of any violent or abusive language.”

This account differs very materially from that given by *Merchant*, and also from the mariner’s plea; but it is an account confirmed by *Thomas*, who

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is examined on the defensive allegation; for, by the death of the mate, the owners are deprived of his testimony.

This is the whole of the testimony on this part of the case; and it establishes a case very different from that represented in the summary petition, and shows, that whatever words were used by the mate they were spoken in answer to a contumacious refusal by the mariner to do his duty and to work. But the case hardly rests here; for it is part of the mariner's own plea, "that he was ordered by the captain to return on board, and that he was desirous so to do; and that he actually returned for that purpose." But *Merchant*, his own witness, does not say that he made any such declaration to the mate on the *Sunday*, or that he requested to see the master, who was then on board. It was his duty to have made this declaration to the mate; and also, both in justice to himself and to his owners, to have appealed from the inferior authority of the mate to the master: for that the master knew of the refusal of the mate to receive this mariner on board, is admitted to be an averment without proof. It is impossible, then, that the Court can give credit to the summary petition on the evidence of *Merchant* alone on this point, in the absence of all proof of the natural circumstance of explanation and solicitation that ought to have accompanied a sincere desire on the part of this man to return to his duty. I think the account is incredible on the evidence of *Merchant*; and it is still further contradicted by the witnesses on the defensive allegation. *Thomas* says, — "Both

he and the mate conversed with *Smith* on shore, and advised him to return to his duty, but he refused." The captain also deposes, — "that he advised *Smith* to return to his duty, but he refused, observing that his messmates would laugh at him for returning after having threatened so often to quit the ship." And the subsequent conduct of the master on the *Monday* is agreeable to this state of facts: for he waits on the agent of the ship *Vibilia*, and informs him "that *Smith* is a deserter, and warns the agent (the captain being too ill to be spoken to), and the boat's crew of that ship, not to take *Smith* on board."

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On this view of the evidence, I cannot hesitate in pronouncing on which side the preponderance inclines: I must again say, that *Smith* has not proved his case either in form or in substance; but, on the contrary, he appears to have been induced, either by motives of resentment, or by a hope of better wages, which he obtained, to desert his duty to his original employers at a most critical part of the voyage, and in a quarter of the globe where the temptation to desert is notoriously strong. The Court, upon the effect of this evidence, is bound to decide that *Smith* failed in the duty which he owed to the owners of the *Jupiter*, and that his conduct amounts to a forfeiture of his wages: and I, therefore, pronounce against his demand.

Wages forfeited.

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VIBILIA. CORBET.

In a suit for wages, the owners, having pleaded the desertion of the mariner from another vessel, and the payment of his wages into *Greenwich* Hospital, under stat. 4 G. 4. c. 25. s. 11., were dismissed, but without costs. *Semble*, that it would have been sufficient to allege such facts in acts of Court.

SMITH, the mariner, whose wages were declared forfeited in the preceding case, sued, in this case, for the wages he had agreed for and earned on board the *Vibilia* (the ship in which he entered at *Jamaica* after his desertion), upon her return voyage to this country. In answer to this demand an allegation on the part of the owners had been admitted, pleading 4 G. 4. c. 25. s. 11., which requires owners of vessels, in which wages have been earned by mariners deserting from another ship, to pay into *Greenwich* hospital the amount of such wages; and further alleging that they had so done, and had complied with the statute.

Lushington, for the owners, now applied for their dismissal, and that *Smith* might be condemned in costs. The owners had been exposed to all the inconvenience and expense of a suit, notwithstanding they had acted agreeably to the provisions of the statute.

The Court.—Some part of the expenses might perhaps have been spared by merely alleging, in an act of Court, the clause of the statute, and that the owners had complied with it. There might also be an ignorance of the law in *Smith*; and, although the owners were undoubtedly aggrieved by these proceedings, it would not be an effectual relief to them to decree costs against a mariner who would probably not be in a con-

dition to pay them. The Court would be sorry to be led into further proceedings in enforcing such a decree, and in a class of cases in which costs were not usually given: it will therefore not make any order as to the costs; but the Court directs the owners to be dismissed.*

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* In the *Susan*, HAMILTON, the Court considered the conduct of a mariner, — who had taken part with another that had been put in irons, and who demanded to be put also in irons, (which was accordingly done, for insolent expressions and acts of a mutinous tendency,) and who had remained in irons for twelve days till the ship arrived at *St. Helena*, and did not then or at any time before retract or apologise for his misbehaviour, but was there left in custody, and came finally to *England* in another vessel, — such as amounted to a forfeiture of the wages earned in the former part of the voyage from *Calcutta*.

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Insolent expressions and acts of mutinous tendency not apologized for, held a forfeiture of wages.

Note. — In the summary petition a restraint imposed upon the mariner at *St. Helena* had been adverted to; and annexed to the owners' defensive allegation there was an extract from the police record at *St. Helena* (beginning with entries in the ship's log), which gave a minute of the proceedings before the magistrates under which the seaman had been detained to be sent home in a ship of war; but the Court, after hearing *Addams* for the allegation, and *Lushington* contra, rejected this part of the plea, observing that, as evidence of the particular misconduct of the mariner, it could not be received.

Extract from a police record, annexed to an allegation in proof of a mariner's misconduct, rejected.

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ADELAIDE. PERENCHIEF.

An inhabitant of *Trinidad*, after a residence of about a month at *Bermuda*, purchased there a slave and her four children, aged 11, 9, 7, and 3, and shortly after embarked with his family and them for *Trinidad*, the mother and four children being described in the endorsement on the clearance, as domestic servants in personal attendance on himself and others of his family: the owner of the vessel, who had a residence at *Bermuda* and *Trinidad*, also embarked with two slaves, born in his family, aged 11 and 7, similarly described in the endorsement. There had been no registry act in the island since 1822; but the late registrar gave a certified copy of the expired registry, and

there was an affidavit of the late owner as to the birth of the youngest child. The vessel was seized while lying at anchor near the port of *Hamilton*, having cleared out for *Trinidad*, and preparing to weigh anchor. The Court, on appeal, holding that the circumstances and situation in which the vessel was seized brought the case within the 5 G. 4. c. 113., and that the removal of none of the slaves was protected by s. 17., reversed the sentence of the Court at *Bermuda*, and pronounced for the penalties prayed.

THIS was an appeal from the Vice-Admiralty Court of *Bermuda*. The libel, or information, stated, that on the 22d of *January* 1827, Capt. *Jones* of H. M. ship *Orestes*, seized the brig *Adelaide*, of 107 tons, as she was lying at anchor near to the dock-yard at *Ireland Island* in the *Bermudas*, and also near to the port of *Hamilton*, having cleared out for *Trinidad*, and preparing to weigh anchor. The ground of seizure was, "that the vessel had on board and was exporting, removing, carrying, and conveying seven slaves from the port of *Hamilton* contrary to the form of the statute or statutes in such case provided; by means whereof the brig and slaves had become forfeited to the King." The penalties were prayed to be apportioned in thirds, — to the crown, the governor of the *Bermudas*, and to the seizer and his crew. A claim of restitution was made on behalf of Mr. *M'Alister* and Mr. *Wainwright*, supported by their respective affidavits, and by an affidavit of the master of the brig, as to her situation at the time of seizure, and that he had not incurred any forfeiture set forth in the information. The Judge of the Court below decreed restitution of the brig and slaves; and from that sentence Capt. *Jones* appealed.

Dodson and *Nicholl* in support of the sentence, *Lushington* for Capt. *Jones*.

The *King's Advocate* on behalf of the Crown.

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JUDGMENT.

Sir *Christopher Robinson*. — This is a case of appeal on the part of the seizor, from a sentence of the Vice-Admiralty Court of *Bermuda*, acquitting the respondents of certain forfeitures and penalties charged to have been incurred by the shipment and removal of slaves from that island. The libel states the seizure to have been made on the 22d of *January* 1827, “near to the dock-yard at *Ireland Island*, and also near to the port of *Hamilton*, in the said island, on the ground that the ship was lying at anchor at *Ireland Island*, having cleared from the port of *Hamilton*, and was preparing to weigh anchor, and had on board and was exporting, carrying, and conveying the slaves specified from the port of *Hamilton*, contrary to the form of the statute or statutes in such case made and provided.” This description of the place, and of the cause of seizure was not controverted in any manner in the Court below. The claim was given with reference to the Consolidated Slave Act, 5 G. 4. c. 113., and with an explanation of the means used by the claimants to comply with its provisions, and particularly those contained in the 17th section. The parties, therefore, were at issue on the merits of the case, as distinctly as any issue could be drawn. But two objections have been raised here to the sufficiency of the information, which it is proper that I should notice.

It is objected, that the information is not sufficiently precise, as it does not negative the several exceptions that are contained in the act, as is required at common law: and several cases have

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been cited in which that rule is fully explained.* The distinction observed in those cases is, that in clauses imposing prohibitions and penalties, it is required that exceptions, accompanying the main prohibitions, should be negatived in the information: but where the prohibition is general, and the exception arises out of a subsequent proviso, it is not required to be negatived in the information, but the defendant is expected to plead it, if it affords any defence.† In this case the prohibition in the second section is general and distinct; but embodying these terms of exception, “except in such special cases as hereinafter mentioned, or as are by this act permitted.”

It might be a fair ground of argument under which class of cases this form of exception might bring such a case as the present: but I do not find that point to be decided. In *Steel v. Smith* Mr. Justice *Abbott* takes the distinction, and observes, “Here are not in the enacting clause any words, such as ‘except as hereinafter provided.’ If any such words had been introduced, it might fairly have been contended that the subsequent proviso was incorporated in the enacting clause, and then the objection might have been supported.” But that point does not appear to have been decided. It would ill become me to go before the courts of common law in reasoning on the common law rule. Considering that the words “except as hereinafter provided” are only used for the sake of greater

* *Rex v. Jarvis*, 1 Burr. 148. *Spiers v. Parker*, 1 T. R. 141. *Rex v. Pratten*, 6 T. R. 559. *Gill v. Scrivens*, 7 T. R. 27. *Steel v. Smith*, 1 B. & A. 94.

† *Jones v. Axen*, Ld. Ray. 120.

distinctness, and are in no manner essential to the force and effect of any proviso introduced in the subsequent part of the act, I should not anticipate from any judgment that I can exercise on the subject, that such a distinction would be eventually sustained. But it is sufficient for me to observe, that the present case is not shown to be within any rule hitherto applied in the courts of common law.

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Another objection is raised on the effect of the charge of exportation. It is said this vessel was seized at anchor off *Ireland Island*; that she had not quitted the port, and there could be no exportation. And the case of *Williams and Marshall** was cited in the argument, in which the Court of Common Pleas held, that a vessel which had sailed from the *London Docks* to *Gravesend* and there anchored, had not quitted the port of *London*, so as to have completed the exportation, required within the time specified in her license. In that case the Court rested much on the fact, that the vessel had not received her last clearing papers, which are usually delivered at *Gravesend*; from which it was inferred that *Gravesend* is a part of the port of *London*. In this case, nothing is shown to identify the anchorage ground, where this vessel was seized, with the port of clearance: it seems rather to be implied that the vessel had proceeded from the port of *Hamilton*: she was lying apparently beyond the utmost point of land or close to it; and, therefore, with reference to the limits of the port of *Hamilton*, I do not think the objection could have been sustained.

But the libel charges other acts besides exportation, as "shipping, conveying, removing." It

* 6 Taunt. 390.

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is said these are used in connection with the term exportation ; but I do not see that they are so restrained by that term as not to be capable of being maintained as a distinct and independent charge. I do not, therefore, think that either of these objections can be sustained ; and I proceed to the merits of the case.

The account which Mr. *M'Alister* gives in his claim of his part of this transaction is, " that he is a *British* subject resident at *Trinidad* ; that he arrived at *Bermuda* on the 5th of *December* 1826, having been induced to visit that island for the benefit of his health, which was considerably impaired by an attack of fever and ague, which increased severely for several weeks after his arrival ; that he found it necessary, for the comfort of himself and family, that he should have at least two additional servants as domestics ; and accordingly availed himself of the first opportunity which offered to supply himself ; that in a family of negroes consisting of a mother and four children, which were publicly advertised for sale, on or about the 29th of *December*, he found such domestics, as he thought would answer his purpose ; that the distress manifested by the female slave *Hannah*, the mother, at the idea of being separated from any of her children, induced him to consult the collector of the customs as to the number of domestic slaves which he might legally take with him to *Trinidad* ; the collector gave his opinion that he might take two for each member of his family, consisting of himself, his wife, and infant child, viz. six of such domestic slaves ; that he thereon decided on increasing his domestic establishment, by the purchase of the whole of the said slaves rather than that they should be separated,

and as *Hannah* was willing to go to *Trinidad*, and had already a son in that island. That in consequence he did on the 29th of *December* purchase the family, and on the same day by bill of sale caused *Hannah* and *Sue* to be conveyed to his wife; *Daniel* and *Wellington* to himself; and the female slave, *Allen*, to his infant daughter."

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This is a full and particular account of the purchase, and of the motives and inducements that led to it. It seems to admit, that these slaves were purchased for exportation; for it is not till after the collector had been consulted as to the legality of exporting them, and till *Hannah* had expressed her willingness to go to *Trinidad*, that the purchase is completed.

On the fact so appearing that these slaves were purchased for exportation to *Trinidad*, it is contended on the part of the seizor, that this alone is a contravention of the statute, which prohibits all transfers and purchases of slaves, except "for the purpose of their being used or employed within the same island." That prohibition to purchase stood, I observe, in the 47 *G. S. c. 36. s. 1.*, as relating only to removals from *Africa*. By leaving out that limitation, and altering the exception, as it now stands in the 13th section of the consolidated act, the prohibition is said to be extended universally, saving only the exception contained in that section. This may be a formidable extension of the restrictions of the act in certain cases: but as there is no charge in the libel alleging any contravention of the act on that ground, I shall only advert to it so far as it may be connected with the illegal acts of shipment and removal, which are specifically charged in the information.

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The justification offered by Mr. *McAlister* is, that the five slaves, so purchased by him, were his domestic slaves, shipped for exportation under the exception contained in the 17th section of the act. While, on the other side, it is contended, first, that these slaves are not domestic slaves within the meaning of that section; and, secondly, that they were not accompanied by such documents as are required in the shipment of domestic slaves, under the provisions of that section. The exception is, "that nothing in this act contained shall prevent any slave, who is really and truly the domestic servant of any person residing or being in any island, colony, plantation, or territory belonging to, or under the dominion, or in the possession, of his Majesty, from attending such his owner or master, or any part of his family, to any place whatever, under the following regulations:— That the name and occupation of every such domestic slave shall be inserted in, or indorsed on, the clearance, and that the master or owner of such domestic slave shall obtain from the registry of the colony an extract certified by the registrar thereof, showing that such slave has been duly entered in the registry of the colony."

The 46 G. 3. c. 52. s. 1. notices two descriptions of domestic servants, with some slight variation as to the form of endorsement. In the consolidated act, the distinction as to two slaves attendant on the person of each passenger is withdrawn, and the exception stands in the general terms which I have stated. It is contended, however, that the only limitation on the shipment of slaves accompanying their masters is, "that they should be domestic slaves, in opposition to agricultural slaves; that all

slaves employed in domestic offices, or coming within the denomination of domestic slaves, may be exported under this exception, without restraint as to number, or without any other description than that of 'domestic slaves,' without any mention of their particular occupation." That construction appears to me to be very indefinite, and liable to great abuse. It is clearly not agreeable to the interpretation put upon the act by the parties, and by the officers of the customs; for Mr. *M^r Alister* distributed his slaves amongst the members of his family. With respect to the form of endorsement, it is not agreeable to the words of the act; and they must speak for themselves. But it is on the broad ground of the *bonâ fides* of this transaction, with reference to the manner in which the parties have acted, in regard to this exception of the statute, that I shall decide this case.

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The account given by Mr. *M^r Alister* has been already stated. It is exposed to this observation, that it assigns different reasons for shipping different members of the family, but all apparently very inadequate reasons for embarking in an experiment of very doubtful legality, on the construction of a highly penal statute. He professes to have been actuated by motives of compassion and tenderness towards the children, and from an anxiety to prevent the separation of the family: but this is a consideration on which he was not at liberty to act in opposition to the restraints imposed by the statute. The circumstance that these slaves were going from one *British* island to another furnishes no favourable distinction; since the 15th section, giving power to the crown to authorize such exportation is very limited, and is confined

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to cases in which it shall be made to appear to his Majesty in council, that such removal was essential to the welfare of the slaves. The law does not allow any private individual to exercise that discretion. And on this point, as well as on all other parts of this case, Mr. *M'Alister* would have acted more naturally, and more prudently for himself, if he had consulted the law officers of the crown, and not merely the ministerial officers of the customs.

With regard to the individuals composing this family, it is certain that they were not domestic servants of Mr. *M'Alister* in any sense, at the time when the exportation was first projected; and at the time of shipment, it is not without great violence to the common acceptation of the terms of the act, that the greater part of this family can be said to be *really* and *truly* the domestic servants of Mr. *M'Alister* or his family.

The slaves stated to have been purchased and shipped by Mr. *M'Alister*, for his own personal accommodation, were, *Hannah*, a woman of forty years of age, described formerly as a laundress, and four children, of eleven, nine, seven, and three years of age. It is not easy to understand how such persons could come within the meaning of any special exception, founded on the personal convenience or accommodation of the master. It is not suggested that the children were capable of performing any service; but it is contended that being the children of a domestic servant, they are entitled to be ranked as domestic servants for all the purposes of this act. That argument has been strongly pressed on the Court; and it appears to be founded on the distinction adopted by the Judge in

the court below, in the only observation accompanying the sentence. "The true question is," says that learned person, "were the persons domestic slaves or not? *Hannah* was clearly a domestic slave; and if *Hannah* be a domestic, I think the children must be so till they are of age to be put to some other occupation." That might be a description of such persons in a popular sense for a plantation inventory or any such purpose, but it appears to me to be a very imperfect exposition of the meaning of the terms used in this act, *really* and *truly* the domestic slaves of the master.

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These terms seem to imply some specific reference to the previous title of the master, or to the use and employment of the slave, for his personal accommodation. And I do not see how they can be said to be justly complied with in either sense, in the history which is given of this transaction. If the act is indistinct in the use of the term "domestic slaves," it is precise in requiring the "name and occupation" to be entered in or indorsed on the clearance. This is a positive condition expressed in the act; and it seems to imply that the exception is granted on account of the special use or occupation of the slave, for the personal accommodation of the master, and not for indiscriminate exportation.

Without some such limitation there is nothing to prevent any number of useless children from being exported to any place. The form of the present endorsement certifies only, that *Hannah*, *Allen*, *Daniel*, and *Wellington* have been reported to the customs as domestic servants in personal attendance on Mr. and Mrs. *M'Alister*, and *Sue*, an infant, about three years of age, as domestic ser-

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vant to Miss *M'Alister*, a child of about a year and a half old. Can any thing be understood to be certified by the terms "personal attendance" in this endorsement, with reference to such persons, more than that they were in the same ship; or can any intelligible object of the act be answered by the shipment of such persons, in such manner? It seems to be avowed, as it may be inferred from the observations of the learned Judge, who was perfectly familiar with the habits and usages of the *West Indies*, that these children were not capable of any real occupation. I feel myself bound then to pronounce, that the whole pretext on which this shipment was made was fictitious and insincere, and contrary to the form and substance of the act.

The claim of Mr. *Wainwright* relates to two slaves, *Bob* and *Belinda*, of the ages of seven and twelve, shipped under the same form of endorsement, and consequently within the same objection as to their actual service and occupation.

They appear to have been born in the family of Mr. *Wainwright*, a resident inhabitant of *Bermuda*; and, in that respect, this claim is distinguishable from the former; but, on the substantial ground of *bond fide* employment, it appears to me to be liable to the same objection.

It may be supposed, indeed, that Mr. *Wainwright* would have persons in real situations of attendance on him; and, therefore, the adoption of such children as these is still more inexplicable. If two of his regular servants had attended him, I cannot but think, they would have been properly described in the endorsement, according to their respective capacities. It would have been a manifest departure

from the words of the act to have done otherwise. If, however, the same inaccuracy had occurred, it might then have appeared to be owing to some error in the Custom House in confounding the certificate under the present act with the former, in which personal servants might have been so described: but now the omission to insert the occupation agrees with the fact that they had no occupation. The departure from the act is not merely a defect of form, but connects itself with the substance of the case; each branch of the objection elucidates and confirms the other. Considering this claim, under all its circumstances, and in its close affinity to the other, I cannot doubt that they proceeded from the same motives; and I feel persuaded, that these slaves would never have returned to *Bermuda*.

In forming this conclusion, I am not insensible to the observation that has been made, on the improbability that *Mr. Wainwright* should endanger valuable property for any object that can be attributed to this shipment. But nearly the same difficulty occurs under any view that can be taken of the transaction. It was in opposition to the words of the statute; and, as I think, in no manner agreeable to its spirit. It would be difficult, therefore, to reconcile this transaction, in any view of it, to the prudence which might be expected from *Mr. Wainwright* with reference to the danger to which his property was exposed: and I feel myself bound to pronounce the same judgment on this claim as on the former, and on the same general grounds. If I am wrong in the view which I have taken of the character of the transaction, I have the satisfaction to think, that the parties will be able to correct

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that judgment by appeal to a superior court ; and if that court should be satisfied of the *bona fides* of the case, it may exercise greater freedom in dealing with the mere defect of form in the instruments attending the shipment.

Having expressed the grounds on which my opinion is founded, I do not think it necessary to enter into the point relating to the validity of the extracts of registry ; nor to express a decided opinion on that part of the case, as it may affect other islands ; and the arguments which have been addressed to the Court, on that point, are founded rather on general information and on political considerations, than on matter properly in evidence before me. As at present advised, I should not have thought myself warranted to have reversed the sentence on that ground ; but, for the reasons which I have assigned, I think that sentence is not agreeable to the terms or to the spirit of the act of parliament. I, therefore, reverse it on the grounds which I have stated ; and pronounce the slaves and vessel forfeited ; and condemn the respondents in the penalties specified in the third and fourth sections of the act : but I shall not allow costs.

Note. — The decree was afterwards superseded as to the master, it being discovered that, as to him, there had been some irregularity in the citation.

CAMBRIDGE. BARBER.

February 28th,
1829.

THIS was a cause of seaman's wages. The petitioner, with several others of the crew, had quitted the vessel at *Calcutta* (on account of a deviation from the voyage as laid in the ship's articles), on the 31st of *January* 1827, up to which time the wages were claimed.

Lushington and *Addams* for the mariner.

The *King's Advocate* and *Dodson* contra.

JUDGMENT.

Sir *Christopher Robinson*. — This is a case of wages, which involves in it a question of considerable importance to the reciprocal rights and duties of owners and mariners, as to the effect of a deviation from the voyage described in the ship's articles. But it does not appear to me that there is any blame or charge of intentional misconduct imputable to either party. The mariner is described as an excellent seaman, and of general good behaviour, and as acting in this particular instance with respect and decency; and on the part of the owners I do not see reason to impute the resistance which has been given to his claim to any improper motives, or to any other feelings than might have been excited by a partial estimate, or a misunderstanding, of their exact rights. The ship sailed from *London* in *July* 1826, on a voyage to *Madras*, *Calcutta*, and from thence back to her port of discharge in the *East India* Docks, as described in the ship's articles. The vessel arrived in *Madras*

and the mariner demanded his wages, and a virtual renewal of his engagement. The whole wages, to the time of his quitting the ship, and costs, pronounced for; though the Court inclined that the mariner had acted illegally in refusing to discharge the cargo.

A vessel, whose voyage was described in the articles as to *Madras* and *Calcutta* and back to *London*, deviated, under a new charter party, from *Madras* by *Prince of Wales' Island* to *Calcutta*. The deviation, though not notified, was known to the crew, who were dissatisfied, but did not remonstrate. The mariner, who after arriving at *Calcutta*, soon demanded his discharge, and refused to work, was put in irons till the unloading was completed, and then quitted the ship: Held, 1st. Such proposed deviation entitled him to his discharge at *Madras*; and, 2dly, His remaining on board subsequently was not an implied consent, nor, as the vessel was not, under the new charter party, to return direct from *Calcutta* to *England*, a virtual renewal of his engagement.

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roads early in *November*, and landed the troops which she had carried out; and there entered into a new charter-party for successive voyages, and took on board other troops, with which she sailed in the latter end of that month to the *Prince of Wales' Island*, and from thence to *Calcutta*. The deviation consists in the new engagements of the vessel, and in going round by *Prince of Wales' Island* instead of proceeding directly to *Calcutta*, occasioning thereby an elongation of distance, as it is computed, of about six hundred miles, and an extension of time of about a month.

This is the general outline of the case. There is no material contradiction in the evidence, though there is some difference in the statements of the pleas.

The allegation on the part of the owners, pleads that the deviation, which had been before noticed in the summary petition, was made with the implied consent of the mariners, inasmuch as they were conusant of the intention and did not express any objection. It is not pretended that any communication of the extended voyage was made to them by the master, or by his direction. On the other side, it is not denied that the crew had some intimation of the change of the course through the officers' servants, or by inference from the troops and stores taken on board; and it is said the crew were greatly dissatisfied with the alteration, though they did not object, or remonstrate, as they could have no communication with the shore at *Madras*, by which they might have sought advice or protection, and they were afraid of exposing themselves to severe treatment. It is proved also by the owners' witnesses, "that it was known to the master, and the ship's officers, that there was much grumbling amongst the crew on account of the

deviation." The ship proceeded to *Pulo Penang*; and from thence to *Calcutta*, and arrived at her moorings in the river at *Kedgee* on the 19th of *January*. The master left the ship in the evening of the same day, and went to *Calcutta*. It appears to have transpired in some manner, that the crew were dissatisfied with the deviation, and were disposed to demand their discharge on their arrival at *Kedgee*; and it is pleaded on the part of the owners, that they delayed to make the demand for two days whilst the master remained in the ship. But there must have been some mistake on that point, as it appears by the log that he was landed on the evening of the 19th, and went to *Calcutta*.

The importance, attached to this slight difference as to the fact, arises from the suggestion that, here again, as well as at *Madras*, the forbearance of the crew to claim their discharge when they might have done it, is to be taken as an implied renewal of their engagement; and, therefore, that they were strictly held to the obligation, to stay by the ship, and assist in the delivery of the cargo, before they could be entitled to their wages and discharge.

It is hardly necessary to discuss the general principles of law, respecting deviations, because it is admitted that the deviation was such as might have entitled the men to their discharge at *Madras* or *Calcutta*, if it had been properly demanded. The reference, which has been made to the cases decided by my predecessor, fully sustains that admission*; and it may not be improper to ob-

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A spontaneous deviation of importance entitles mariners to their discharge by the law of England; and where by some other codes an alteration is permitted, the mariners are to be compensated.

* *Eliza*, IRELAND, Vol. I. 182. *Countess of Harcourt*, BUNN, Ib. 248. *Minerva*, BELL, Ib. 347. *George Home*, YOUNG, Ib. 370.

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serve, that wherever a different principle has prevailed, it has always been required that any alteration of the original voyage, that the owners or masters may make, shall be accompanied with notice and compensation to the mariner.

By the *Danish* code,* mariners are not allowed to leave their master on account of the enlargement of the voyage by a different destination, but an increase is to be made to their wages; and in *Vanlinden's Institutes of the Laws of Holland* † I find this passage: — “With respect to the hiring of sailors, there is this distinction between it and an hiring or engagement for any other service, — that the master, although he alter the voyage, may compel them to remain in the service, provided he makes them a reasonable addition to their wages.”

I cite these foreign ordinances to show, that on the harshest construction of the duties of sailors, something is required from the master in the way of compensation, to reconcile them to their new engagement. The law of this country puts a freer construction on the service of mariners, as well as of other persons. It requires them indeed in ordinary cases, to stay by the ship till the discharge of the cargo ‡; but this is a duty which relates to a subsisting contract, where the other party has done nothing to supersede it. Where it has been interrupted, and this strict obligation between the parties has been loosened or relaxed by a clear breach of contract; or, by ambiguous conduct on the part of the master, raising reasonable doubts as to its

The law of England, in ordinary cases, requires the mariner to stay by the ship till the discharge of the cargo; but this is only where the other party has done nothing to supersede the contract.

* *Jacobsen on Sea Laws*, p. 142.

† p. 625.

‡ *Baltic Merchant*, Edw. 86.

continuance, it can be explained only on the broad principles of equity, and reciprocal justice.

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In the present case no cause is assigned for this deviation, which connects it in any manner with the general object of the voyage, as growing out of accident, or overruling authority. It appears to have been perfectly spontaneous, and to have originated in a new charter-party entered into at *Madras*, for several voyages in the eastern seas at an increased profit; and the ship has actually made successive voyages to *Madras*, *Prince of Wales' Island*, and places in the *Straits of Malacca*, and again to *Calcutta*,—and it was not till *May 1828*, that she returned to England. Immediately after the dismissal of the crew, at the time in question, she appears to have sailed again with passengers for *Madras*; which justifies, in some degree, the apprehension expressed by the mariner, that he might be carried to sea against his will.

On the subject of deviation, in our own law, I find, in Sir *Edward Simpson's* notes, cases, in which the necessity of going to *St. Petersburg* for a cargo, which the master had been disappointed of obtaining at *Hamburgh*, and alterations, arising from stress of weather,—or the order of the government, have been held not to be deviations amounting to a breach of the mariners' contract, such as would entitle them to their discharge: and, in maritime engagements, allowances are often made in the interpretation of general terms, according to the accidents affecting the common object of the original voyage. But, when no such ground of exception exists, justice and policy concur in requiring a strict observance of the speci-

Deviations, proceeding from accident or overruling authority, do not amount to a breach of the mariner's contract.

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fied conditions of the contract: and in the present times, especially, of increased enterprize in distant commerce, considerations of this kind gain additional force, from the length of voyage and extent of time for which such engagements are formed.

On the question, which seems to be raised by the owners' plea, as to which party ought to have spoken first in making or demanding the explanation, I cannot but feel that it is a little hard on the Court to be required to put a severe and penal construction on such reserve as is imputed to the mariners, when a little more frankness of behaviour, on the part of the master, might have reduced every thing to an amicable understanding between them. Now that it is admitted, that the deviation was such as to have entitled the mariners to their discharge at *Madras*, if it had been demanded, and at *Calcutta* after the cargo had been unloaded, I have a right to say, that the master would have done well, and I think no more than his duty, if he had treated the question openly on that principle, either at *Madras*, or before their arrival in the river *Hoogley*, when the articles were read, as a sort of threat or intimidation to the crew, as it is described in the evidence.

The only point at issue now is, with respect to four or five days,—whether the mariner by refusing, under the peculiar circumstances in which he was placed, to work in the unloading of the latter part of the cargo, has incurred a forfeiture of the wages otherwise due to him.

The facts relating to this part of the case are shortly these: the vessel arrived at *Kedgee* on the 19th of *January*, and the master went to *Calcutta*. The unlivery of the stores put on board

at *London for Calcutta*, was commenced immediately. On the 22d of *January*, *Smith and others* wrote a letter to the master, demanding their discharge; but it was not a disrespectful letter in its terms, or in the manner of presenting it. The mate promised that the letter should be forwarded to the master; but its delivery to him appears to have been delayed by some accident or negligence in the post. On the 24th a letter was received from the master, and the mariners expected that it would have contained an answer to their request. It did not however, and on receiving that communication they refused to work. The crew were mustered: the mate remonstrated with them on the consequence of quitting their duty before the cargo was unlivered, and promised them that if they continued to work in the unlivery of the cargo, they should have their discharge if they were entitled to it.

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The greater part of the crew returned to their work, but *Smith* and eleven others persisted in refusing, and they were put in irons, and so remained till the 31st of *January*. In the mean time, on the 25th of *January*, the expected answer from the master arrived, and he directed the mate to inform them, "that such of the crew as were desirous of leaving the ship, should have their discharge, and their wages, upon the outward bound cargo being discharged." The purport of this letter was communicated to the crew, and to *Smith*, but he did not express any desire to return to his duty, though *O'Brien*, to whose evidence I am referring, does not recollect whether he was then actually required to return to his duty. On those assurances the rest of the crew continued to work in the unlivery of the cargo, till the 31st of

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January, when it was completed, and such as desired to leave the ship were discharged and received their wages. *Smith* and his companions were released, and informed that if they would then return to their duty and remain in the ship, it should be understood that the forfeiture of their wages should not be insisted on, and that their misconduct should be overlooked. The log states this matter a little differently in the following entry: "released the men from irons, and gave them the option of remaining in the ship or not. All hands left." But *Murray* says, on the owners' allegation, "that the chief mate gave *Smith* and the others to understand that their wages would not be paid unless they agreed to continue with the ship."

On the admission which has been made, that the mariners were entitled to their discharge at *Madras*, I do not know whether it would be denied that they are, at least, entitled to that portion of their wages. If it is said that by their silence they virtually renewed the original engagement, and so exposed their anterior earnings to forfeiture under the original contract, that is the utmost that could have been said, if the original engagement had been actually and entirely renewed, restoring them thereby to their benefit under it of being brought back to *England*, on the terms and within the ordinary period of the voyage, described in the ship's articles. But no such voyage was ever renewed. The new charter-party is represented by *O'Brien* to have been for two trips to *Pulo Penang*; and the subsequent events have proved that if the mariners had replied on a renewal of the original engagement by their acquiescence, they would have deceived themselves, and greatly

to their own prejudice. The ship went indeed to *Madras* from *Calcutta*, but then she started again for *Pulo Penang*, and it is admitted that it would have been very disadvantageous to the men to have been discharged at *Madras*. The utmost therefore that can be attributed to the silent acquiescence of the mariners, in the voyage to *Pulo Penang*, is an engagement *de facto* for that voyage, and that they performed.

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The same reasoning may be applied to the voyage to *Calcutta*. Nothing was explained to the crew, that enabled them to judge how far the delivery of the remaining stores would be made at *Calcutta* under the original agreement. And though I think the mariners acted hastily and imprudently, and perhaps illegally in respect to that voyage, in refusing to continue to work in the discharge of the remaining part of the cargo at *Calcutta*, I do not think that I can justly or equitably pronounce that they have thereby incurred a forfeiture of the wages earned in the former parts of the voyage.

With respect to that small portion which may be connected with the delivery of the cargo, it is to be recollected, that, by the deviation, they were thrown into doubt and uncertainty, which may justly operate in extenuation, at least, if not in perfect justification, of their conduct. They are entitled also to some allowance for the imprisonment which they suffered; and the Court must consider also, that from the manner in which the ulterior voyage was managed, in going light with passengers only to *Madras*, an additional labour was thrown on the men, of loading the water and rice to ballast the ship, as they unloaded the cargo; which was an act in preparation for a voyage in

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which they were to have no interest. I think also that the use made of the supposed forfeiture to constrain them to sign new articles for indefinite voyages, under a representation that on those conditions only their wages would be paid to them, was an undue advantage taken of them, in the doubt and uncertainty in which they were placed by the acts of the master.

On these grounds, and on the authority of the *Countess of Harcourt*, in which the men, who refused to work after they were entitled to their discharge, had nevertheless their whole wages allowed to them, I shall make no abatement for the time of their imprisonment from the 24th of *January* to the 31st, when the cargo was all unlivered. There is no reason to suppose, that the ship was detained at *Kedgee* by their refusal, nor that greater expenses were incurred, as the additional body of *Lascars* only came on board on the 31st to navigate the ship; and Mr. *O'Brien* cannot undertake to depose, that the ship was detained thereby.

I pronounce therefore for the whole wages; and I will only add the expression of a hope that what has happened in this case, and in others that have been decided on the same principle, will be a caution to masters and owners, on these distant voyages, to act with frankness and liberality to the crew, in respect to any deviations that may affect their interests. It is by such treatment only that they can expect to retain good seamen in their employment; and it will be found ultimately to be the only beneficial principle on which such engagements can be regulated. If contingencies are incident to such voyages, and can be foreseen, they

should be provided for in the ship's articles. If they arise unexpectedly, power should be given to the master to make compensation for any deviation that may be legally considered to affect the original contract. I decree for the whole wages, as claimed, and with costs.

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MAITLAND. STUDD.

May 21st,
1829.

THIS ship had been sold in a suit of subtraction of wages, and the present application was made on behalf of some material men, to be paid out of the remaining proceeds. The claim was made, by Mr. *Davison* and Mr. *Lupton*, for two several sums of 600*l.* and 800*l.* for ropes, tackle, and provisions.

The ship belonged to Mr. *Ferguson* of *Calcutta*, and had been chartered in 1825, for three voyages, to *Frazer* and Company of *London*. Under that charter-party the owner was bound to repair, and the freighter to supply provisions and pay the crew's wages. The supplies in question were furnished upon the second voyage, and upon her return to *England* in *December* 1827, *Frazer* and Co. had become involved, and, as alleged, so also had Mr. *Ferguson*; he, however, attached the freight in the hands of the *East India* Company: and the men having sued for their wages, the ship was sold; and also with a view to defray a bottomry bond given by the master in *India*.

Where a vessel had been sold, in a suit of subtraction of wages, the Court refused to direct proceeds in the registry to be paid out to material men, where the owners opposed the application, and the accounts were disputed. But the case being a new one, the Court did not give costs.

The *King's Advocate* for the motion.

The principle adopted in the *John*, JACKSON, (3 Rob. 288, 290.) applies to *British* as well as to

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foreign ships; and the owner, *Ferguson*, was to be considered as a foreigner, since he resided out of the jurisdiction of the Court; and *Davison* and *Lupton* had both contracted upon the joint security of the freighter, the master, and *Ferguson*.

Lushington contra.

In the *John*, the ship was foreign, and there was no opposition. Here the owner opposed the claim; and in such a case there was no real distinction between claims founded upon original suits, and proceeds in the registry. Here the demand also was inequitable, as the freighter was personally liable: he had become a bankrupt, so that *Ferguson* could only recover a dividend out of his estate; whereas, if this application were granted, it would pay the whole demand.

JUDGMENT.

Sir *Christopher Robinson*. — This claim is advanced only as an exception out of a rule admitted to be generally universal. The Court, therefore, may reasonably expect strong proof of authority, from precedent or principle, to enable it to maintain its jurisdiction upon such a claim: for it is the duty of the Court to consider the question of jurisdiction with great caution, as well on account of the parties as of itself. If the Court should exceed its just authority, it might endanger the jurisdiction hitherto retained over cases not opposed, and ultimately involve the parties in fruitless litigation. It cannot, therefore, attend to arguments founded merely on suggestions of general equity, unless its jurisdiction is clearly established. The authorities referred to are very limited: they relate only to proceeds *remaining in the registry*—an ambiguous term, which seems rather to apply to cases

where no appearance has been given for the owners, than to cases in opposition to their claims; as, in such cases, the proceeds can hardly be said to be *remaining* in the registry, being detained there only by the warrant of the court, and adversely to the demand of the owner. It may be doubtful what would be the accurate interpretation of these terms, if they could be traced in the cases which have established the exception in a certain degree. In the *John*, which has been cited, there was no opposition, and no argument; and the effect of former practice is stated only in general terms.

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There does not seem to be any solid distinction between original suits, and suits against proceeds, in cases that are opposed; whereas in cases unopposed, the exercise of a judicial discretion by the Court in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion and capable of being justified to that extent, notwithstanding the general prohibition. In the case referred to, the Court acted with the greatest caution and forbearance; and actually refused a second claim as being too complicated in its circumstances. The authority of that case, therefore, does not extend to the present, but is rather adverse to it.

It is said that the owner is, in this case, virtually a foreigner, as he is living in *India*, and out of the jurisdiction of the Courts of this country: but that fact existed at the time of the contract, and consequently these material men could not rely much on this security; although it is suggested that they contracted under the joint credit of three parties,

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viz. the owner, the freighter, and the master. It appears indeed, from another circumstance, that they can have sustained no serious injury from their disappointment in not being able to sue the owner; for it has happened, by accident only, that the ship has been brought within the jurisdiction of the Court, and owing principally to the neglect of the freighter to pay certain demands which lay upon him by the charter-party. These, however, are but remote considerations; since the particular facts are so complicated, as to be incapable of being arranged or settled by any power which this Court could exercise over them. In the averments which the parties have made, they have thought it necessary to refer to accounts disputed by the other side; and the very statement of two items, one of 4000*l.* for repairs in a former voyage, and another of 6000*l.* for losses in consequence of the owners' neglect in not executing the charter-party by proper and timely repairs, is sufficient to show that this is a case far beyond the ordinary interference of this Court. The demand, therefore, cannot be sustained.

Upon interest and costs being applied for on the part of the owners, the Court observed:—It could not decree interest for the time of detention; nor would it be proper to give costs, as this was the first instance of a contested case in opposition to the owners' claim. It might therefore not be an unfit case for experiment; but if such demands were renewed, it might then be necessary to discourage such proceedings by a condemnation in costs.*

* On the subject of material men, and prohibitions in respect of their claims, in the Court of Admiralty, see *Sir Leoline Jenkins*, vol. ii. p. 746.

OSCAR. LOFGREN.

June 25th,
1829.

THIS was an appeal, brought by the owners, from an award of salvage made at *Colchester* by three magistrates of the county of *Essex*.

The *King's Advocate* and *Addams* in support of the award.

Lushington and *Haggard* contra.

JUDGMENT.

Sir *Christopher Robinson*. The facts of this case are shortly these: — the *Oscar*, a *Swedish* ship bound from *Sweden* to *South America*, with a cargo of deals, struck on the long sand off the coast of *Harwich* on the night of the 3d of *January*; she came off again, but with the loss of her anchors, and with her rudder unshipped. The master, at daylight, hoisted a flag of distress, which was answered by two fishing boats, the *Whiting* and the *Aid*, who went to her assistance. The weather was boisterous with snow and rain, and the sea rough. The master of the *Oscar* states that the boats came to his assistance, and by their exertions saved the ship. These particulars are set forth more in detail by the salvors, and apparently without exaggeration. The services of the *Whiting* and of the *Aid* continued to be performed with much labour, and, I think, with some danger, from *Saturday* morning through the whole of *Sunday*, and till *Monday* at noon, when the vessel was anchored off the *West Rocks*, as owing to the state of the wind and tide the ship could not reach any

Upon an appeal from an award of magistrates in a cause of salvage, the Court allowed a new appraisal to be made at the prayer and expense of the owners (who had not by themselves or agents objected to the original appraisal); reversed the award, and gave a fixed sum, together with their costs and losses, to each boat according to their respective merits, instead of a certain proportion of the value among them generally.

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port. At noon on *Monday* more assistance was required, and the *Flora*, another fishing boat, was hailed and came up ; and soon afterwards the *Samuel* and the *Hope* came together, and with this additional assistance the ship, on the evening of that day, was brought to anchor, and continued during the night with the boats lying round her : but it was not till the morning of *Wednesday* that she was moored in a place of absolute safety in the *Colne* river.

On these facts the magistrates, upon an appraised value of the ship and cargo at 3400*l.*, awarded the sum of 694*l.*, being one fifth ; and at the rate of 90*l.* for each boat. The expenses of the proceedings, the allowance for damage to the boats, and loss of cargoes of fish, computed at about 270*l.*, are all included in this award. The valuation was taken verbally, partly upon examination, and partly upon interrogation, and the carpenter who valued the deals appears to have taken no notice of duties, but to have estimated them as they might be lying in his yard for use. The ship was valued at 2000*l.* ; and it is in evidence before me that she was actually insured at *Lloyd's* for 1800*l.* The owners, however, were dissatisfied with that valuation ; though neither their agent nor the captain appear to have made any objection at the time ; and upon the appeal being prosecuted, the Court was moved to grant a second appraisement : this motion was resisted by the salvors, but the Court directed it to issue without prejudice to the case, and at the expense of the owners. The return to that appraisement estimates the ship at 1200*l.* ; and the cargo at 600*l.* ; and as it remained still doubtful whether the original valuation had

been made with or without the duties, the Court directed a further enquiry in that respect, and the reported value of the cargo is now stated to be 600*l.* exclusive of duties.

Upon these facts the Court cannot omit to observe, in the first place, that in this case much time and expense have been lost by the proceedings before the magistrates under the salvage act. That statute, the 1 & 2 *Geo.* 4. *c.* 75., was intended to provide for the reduction of expenses, and to prevent delay in small cases; and although under the general words of the eighth clause it may be competent to the magistrates to proceed in cases of greater magnitude, it is manifest that the primary object of the act was to provide for small and occasional services only, such as those specified in the act; and the magistrates cannot proceed in cases of a higher description with the same prospect of benefit or advantage to the parties. In large cases, the interest will be likely to induce one party or the other to be dissatisfied with the award, and to appeal to the High Court of Admiralty; there must then be the expense of two proceedings, which, as in this instance, will amount to nearly as much as the salvage. The owners must ordinarily, and except in cases of positive misconduct, defray these expenses, and it would therefore be an improvement of the act, if they had the power of removing the case to the Court of Admiralty in the first instance. The magistrates may judge with advantage of local circumstances, and of the value of the loss or damage occasioned to the salvors in consequence of their exertion; but they are inadequate judges of the principles that ought to govern cases of value, with reference to rules

Ocean.

June 20th,
1859.

The primary object of stat. 1 & 2 *G.* 4. *c.* 75. was to provide for small and occasional services, though under the general words of the 8th section, it may be competent to the magistrates to proceed in cases of greater magnitude, but with less prospect of advantage to the parties.

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 1829.

of general policy, or the consistent application of analogies drawn from other cases, which is so desirable to be observed: and, more particularly, they must be very ill qualified to apply a rate of proportion, as they have done in this, and in a former case, by giving integral proportions of the value.* 'The rates of simple proportion graduate at large intervals; while the estimate of services, labour, and enterprise, requires to be made as minutely as possible under an infinite variety of particulars; and may, therefore, be better done by the allowance of precise sums.

In the present case the proportion of one fifth is given as for the five boats, without any discrimination; whereas two were employed five days, and the others three days, and under very different circumstances. In consequence of the alteration in the appraisement, it is not denied that the award of salvage must be reduced. The reduction of value has been nearly one third: and taking, therefore, the value of the ship at 1800*l.* the amount at which it was insured, and the cargo at 600*l.*, the allotment must be made upon 2400*l.* instead of 3400*l.* In addition to the sum at which the original proceedings and the loss and damage were estimated, there will be considerable expenses incurred by this appeal, which the owners must pay. I cannot be inattentive to these considerations in apportioning a salvage remuneration.

The services of the two first boats were, I think, very great: they were very meritoriously per-

* See *The Vesta*, *suprà*, p. 189: also *The Salacia*, GARLAND, *infra*, pp. 263, 264.

formed through two days and two nights, with much labour, in extremely bad weather, and not without some danger; and I feel, that in the sum which I shall allot to these two boats, I shall give less than I should perhaps have been disposed to give if the value of the property had been greater.

Whether these two boats were to have shared equally with the rest under the award I do not know; but if there was to have been any other apportionment amongst themselves, collectively, it shows still more strongly the defect of the principles on which the award has been founded. It is then, under these circumstances, the duty of the Court to reverse the award, and I decree a salvage of 220*l.* to be divided among the smacks in the following manner; viz., to the *Whiting* and *Aid*, 75*l.* each; to the *Flora*, 30*l.*; to the *Samuel* and *Hope*, 20*l.* each; together with their expenses both before the magistrates and in this court, and the loss and damage sustained by the different salvors, the amount of which must be referred to the registrar and merchants.

Award reversed.

OSCAR.

June 25th,
1829.

July 2d,
1829.

SALACIA. GARLAND.

In cases of civil salvage, the Court of Admiralty does not recognize the rule of proportion, but awards an equitable remuneration for the service rendered, though such remuneration is more liberally allotted in cases of large value. Arbitrators having given one fourth of the ship, viz. 600*l.*, the Court awarded out of the cargo, of the value of 38,000*l.*, 1000*l.* for contingent losses; 1500*l.* salvage reward; and 200*l.* for the master's particular expenses.

THIS was a cause of salvage instituted on behalf of the owners, master, officers, and crew of a ship called the *Washington* of the *United States of America*; and also on behalf of the master, officers, and crew that had belonged to an *English* cutter, the *Dart*, against the owners of the cargo lately laden on board the *Salacia*.

The *Salacia*, an *English* ship, while on a voyage from *Hull* to *Lima*, had put into *West Point Bay* in *Great Falkland Island* on the 11th of *May* 1826, for a supply of water, where she was driven on shore four times. On the 20th of *May* she struck upon the rocks and was thrown on her beam ends; and in this situation was found on the 12th of *June* by the *Washington*; and on the 17th of *June* Capt. *Garland*, the master of the *Salacia*, requested Capt. *Percival* of the *Washington* to make a survey and state the condition of the *Salacia* and the means that might be adopted to rescue her from her dangerous situation. This survey was made on the 18th; when Capt. *Percival* and his crew together with Capt. *Duncan* and the crew of the *Dart* (who had been previously wrecked on the rocks off the *Falkland* islands, and received on board the *Salacia*) undertook to attempt the release of the *Salacia*, which after unlading half of the cargo was effected on the 21st of *June*; and on the following day she was moored in the bay. By the 28th, her cargo was reshipped, and on the 7th of *July* she was ready for sea and proceeded on her voyage to

Valparaiso. On her arrival at that port proceedings for salvage were instituted; and a reference was made to arbitrators, who awarded 600*l.* as one fourth of the value of the ship; and it was then agreed between the consignees of the cargo and Capt. *Percival* that the question as to the cargo should be referred to this Court.

The cargo was estimated at 38,000*l.*

Lushington and *Pickard* for the salvors.

Dodson and *Addams* contra.

SALACIA.

July 2d,
1829.

JUDGMENT.

Sir *Christopher Robinson*. — The Court examined much at length the facts of the case as represented in the affidavits, and pronounced it to be a case of great merit; and, advertent to the arbitration on the ship, observed: — The arbitrators have gone a little out of their way perhaps in considering what might be likely to be done by this Court, intimating an expectation that it would award an equal proportion of the cargo. They awarded one fourth of the value of the ship, following perhaps a course of proceeding familiar enough in ancient times; but which is not now countenanced in the practice of this country. It is a rule which may be conveniently adopted by the authority of public ordinances with regard to war salvage, and other questions of positive regulation: but with reference to an equitable remuneration for labour or exertions of enterprise in rescuing from imminent danger a valuable property, it would be a rule of very unjust and inconvenient application.

It is a suggestion of common reason, that where the property is very large, a smaller proportion may afford adequate remuneration; and as that is the only

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1829.

true measure of reward, it is absurd to assign fixed proportions, which must operate so very differently according to difference of value ; and the danger of exciting unreasonable pretensions, and of thereby promoting litigation and preventing the best settlement of such claims by amicable arrangement, is a public inconvenience that ought as much as possible to be avoided. The rule of proportion therefore is a rule which this Court has not recognised, and will not adopt on any recommendation. The question will always resolve itself into the consideration of circumstances attending the particular case. When the amount of reward is so fixed, it will be seen what is the proportion ; and it may be so expressed in popular language ; but the case must be substantially determined on more particular considerations than those of proportion.

In assigning, therefore, a reward out of so large a sum with reference to the services performed, I shall be disposed to do it liberally without any incitement from others. I will say also, that this is not a case in which the Court will confine itself to giving specific sums to the individuals who were actually employed. The service was rendered with some degree of risk to the property of the owners, and, therefore, it will be impossible to keep out of view all consideration of them. Where assistance is given under circumstances that involve the owners in no danger, they are not entitled to much compensation ; but, upon general principle, I think it is impossible the Court can do complete justice in distributing a remuneration out of a large sum without taking into its view the danger to which their interests may have been exposed ; and many cases have occurred in which that principle

In cases of large value, and where the service has been rendered with risk to the property of the owners, the Court, both in maritime and military salvage, allots a portion to the owners.

has been acted upon in maritime as well as military salvage. I cannot accede to the argument, therefore, that the owners are entitled to nothing, or only to a very small proportion of the reward; though I cannot at present say what limits may be proper to be assigned to their claim. There is something further necessary to be done before the Court can proceed to give a final judgment upon such a claim; at the same time I have thought it my duty to express my opinion upon the facts, that they are such as entitle the persons immediately employed in the service, and also the owners, to be liberally remunerated.

Some reflections have been thrown upon Capt. *Percival*, for what is described as duplicity or equivocating conduct on his part, in declaring at first "that he should not demand any salvage, but that his crew would not work unless paid for their labour, and that they declined to take a dollar a day, but would accept two;" and, it is said, he made such an agreement for them. It is probable that some such conversation may have passed at the beginning of this service, but it might not be known what would be the extent of it; and the Court is not in the habit of considering such loose conversations as conclusive of the merits of any case, when brought regularly before it. In answer to such observations, it is proper to state that which appears to a contrary effect in the letter of the *American* consul to the owners in *America*. I must presume from the station and character of this gentleman, that he could not be so biassed by national feelings or favour to the owners as to misstate facts. It would be a great impeachment of his character to suppose that he could be guilty of misrepresentation; or that he

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The Court does not consider loose conversations, at the time the service is rendered, conclusive of the merits of the case, nor the quantum of reward.

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would apply to the conduct of Capt. *Percival* terms of commendation which it did not merit. In so doing he would only lead the owners to form expectations which the event would not justify, and thereby involve them in eventual disappointment.

In his letter to the owners of the ship at *Boston*, dated on the 20th of *November*, the consul thus writes, in terms of great commendation, of Capt. *Percival's* conduct: — “No man ever behaved better to people in distress than Captain *Percival* did; and were those interested in her and her cargo well apprised of his essential services, there would be no question of their coming forward at once with such a remuneration, by way of salvage, as would be worthy of them. Had the demand of Capt. *Percival* been carried to extremities in the courts of this country, there would be little left for the owners or underwriters in *England*; but moderation and confidence in the honour and liberality of the *English* underwriters and merchants have guided the course of the commander of your schooner, whom I consider, as do all here, to be a man of great worth, possessing humane and good feelings.” I have great pleasure in reciting this testimony to the moderation as well as to the humanity of this officer, and more particularly as it is a display of these honourable qualities in the assistance rendered, by a stranger and foreigner, in the preservation of *British* property in a distant part of the world. The consul concludes, “The necessity of coming here, and of proceeding to other parts of this coast, have deranged the original intention of the voyage, which is a matter for consideration, and for which I hope you will be made whole.”

This was the opinion entertained on the spot by a gentleman who was well qualified to form a just estimate of the merits and general conduct of Capt. *Percival*, and it confirms very much the affidavits in support of the claim, and shows that Capt. *Percival* had gone to *Valparaiso* for purposes which appeared fully justifiable to all persons in that place. How he was to have acted in any other manner has not been explained. He certainly acted most beneficially to the owners in carrying the *Salacia* and this valuable cargo to the place of original consignment, which must have contributed greatly to the preservation of the property. If there was any way in which he might have retained his claim by putting a man on board, or staying a shorter time, — any mode that would have reduced his demand on the score of expense and immediate loss, I should concur in wishing that course had been pursued; but if there was only the alternative of abandoning the claim for salvage, or deferring for some time the fishing voyage on which he was destined, I do not know that I can say he ought to abandon that which was a present and immediate interest for the more remote speculations of fishing; and I must suspend my judgment on this part of the case, till I can receive more particular information respecting the alleged loss of the sealing season, the substituted employment of the *Washington*, and the use which Capt. *Percival* made of his time. I cannot, without knowing more than I do, decide upon the very large allowance claimed for Capt. *Percival*, exceeding 3000*l.*, a sum, of which it is stated he has incurred the loss, besides his expenses in coming to this country of 600*l.* or 700*l.*; making altogether a disburse-

Saxton.

July 24,
1839.

SALACIA.

July 2d,
1829.

ment for which he claims a compensation of nearly 4000*l*. With respect to his journey to this country, I do not see that it was necessary; and I doubt whether I should be justified, without further information, in admitting that charge against the property. I cannot then, at present, proceed to do justice to the satisfaction of all parties without further evidence. Something can probably be stated with reference to Capt. *Percival*'s subsequent employment: it is clear that he did not stay in *Valparaiso*, for the result of the arbitration was not finished; that fact, therefore, is in his favour; he had some object which he did not abandon for this service, which leads to a supposition that he did not stay longer than was thought necessary in the opinion of those under whose advice he was acting. He arrived at *Valparaiso* in *August*, and stayed till *November*; that may appear a considerable time; but, whether he could have resumed his sealing voyage sooner, or whether there was any other speculation which afforded a prospect of benefit, so as to enable the Court to strike a balance between the employment which he relinquished and that which he substituted in its stead, is matter for further information.

I do not see how I can deal with this part of the case better than by referring it to the registrar and merchants to report upon those two points relating to the outgoings, as they may be called, and to the course which Capt. *Percival* would have pursued if it had not been for his attendance on this vessel during the time he was in *Falkland Island*, and the subsequent time, according to what may be stated by the parties in reference to the necessity for such attendance. It is a question in which the interests of the parties are of importance, as well as

the principle ; and I am anxious not to take more from the owners than is justly due ; but at the same time to do justice to those who have conducted themselves so meritoriously in the preservation of this valuable property. If, the principle being settled, the parties can approximate so as to produce offers from the owners or the underwriters that would be acceptable to the claimants, it would be very honourable to the national liberality to make such a tender, and in the other party to accept it. I have now stated my view of the case, and I shall proceed to allot a liberal remuneration when I receive the information which I require.

I do not know whether it is necessary to advert to the *Dart*. The master of the *Salacia* had received the master and crew of that ship into his vessel ; and they might be expected to do something, like other parts of his own crew : yet working, as it is stated they did, night and day, they may be held entitled to some remuneration. It is probable the principal salvors will admit their interest in some proportion, which may be settled by agreement between them, as they were acting together, and the claim is given jointly for them. The crew of the *Washington* alone might not perhaps have been able to effect the service. The *Dart*'s people went away in the *Washington* at last, and it cannot be said that they were so completely identified with the crew of the *Salacia* as to be precluded from advancing any claim for the services they performed. At the same time, I am not disposed to increase the award materially on their account.

COURT. — The registrar and merchants have reported the loss sustained by the owners, or persons interested in the sealing voyage, of the *Washington*

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The crew of another vessel on board the wrecked vessel, rather as passengers than as part of the crew, are entitled to some reward for salvage services.

July 27th.

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1829.

at the sum of 1000*l*. This report is important for two purposes. It relieves the Court from the task of forming conjectural estimates of such consequences as are attributed to the engagement of the vessel in this salvage service; and it removes also every doubt on the merit of the service which Capt. *Percival* thus undertook. It establishes the fact, that he did engage in such service at the probable risk of great loss and inconvenience to himself and his owners. (a) It was a great responsibility that he took on himself in so doing; and these considerations are important in establishing the higher character of merit in the service performed.

I have looked over the notes of such cases as have occurred of large value, with a view to form what may be deemed a proper scale of reward according to the practice of this country (b): and wishing to act liberally upon the general principles of this Court, and more especially in a case relating to the meritorious exertions of a foreign master and crew in the preservation of *British* interests, I think I shall take a proper average estimate of the services rendered in this case in comparison with others, if I allot in addition to the 600*l* already given, 1000*l*. as a compensation for the loss of the

(a) It was in evidence that another *American* vessel in the sealing trade, had quitted *West Point Bay*, declining to assist the *Salacia*.

(b) The cases referred to by the Court, were the *Porcher*, FAULKNER, (before *Trinity Masters*,) in which, upon a value of 53,000*l*. the Court gave to the commander, officers, and crew of H. M. S. *Dryad*, 1,000*l*., and to the smack *Patriot*, 600*l*. The *Balsemao*, ALVEZ, in which the Court (assisted by *Trinity Masters*,) gave to two pilot boats, out of a value 30,000*l*., 1,250*l*., thus reversing an award of 400*l*. The *Waterloo*, BIRCH, 2 *Dod.* 442.

sealing season and other items included in the report of the registrar and merchants; and 1500*l.* as a gratuitous remuneration for the salvors, together with their costs.

The Court, therefore, confirmed the report of the registrar and merchants; and out of the sum of 1500*l.* it allotted 50*l.* to the master and crew of the cutter *Dart*; and further pronounced 200*l.* to be due to *Isaac Percival*, the master of the *Washington*, for his particular expenses.

SALAOIA:

July 27th,
1829.

THE SLAVE, "FANNY FORD."

July 18th,
1829.

THIS was an appeal from the Vice-Admiralty Court of *St. Christopher's* brought by *Harriett Gardiner*, a *British* subject resident in that island, claimant of the slave, "*Fanny Ford*," the sole property of the infant daughter of *Mrs. Gardiner*. The slave had been seized in the town of *Basseterre*, by a waiter of *H. M.* customs for that port.

The libel or information pleaded the illegal *exportation* of a female slave, called *Fanny Ford*, from *St. Christopher's* to the island of *Saba*; and it appeared from the evidence that the slave had belonged to *Mrs. Ford*, who had connections in business in *Saba*, and among them, with an old *Creole* woman, to whose care this "unmanageable" child was consigned; that between 1814 and 1818 the child passed from one island to the other several times; and in 1818, finally returned to *St. Christopher's*. She was sold on the death of *Mrs.*

The 5 G. 4. c. 113. s. 47. is only indefinitely retrospective as to importations: the Court, therefore, on appeal, reversed a sentence, condemning a slave as illegally exported nine years before.

THE SLAVE,
FANNY FORD.

July 18th,
1829.

Ford; and transferred by the purchaser to the present possessor. In 1827 she was seized and condemned, with costs, under the 5 G. 4. c. 113. s. 47. *Dodson* for the appellant.

JUDGMENT.

Sir *Christopher Robinson*, — After stating the above facts: — It is of great importance that all proceedings under the slave abolition acts should be instituted with great caution on the part of public officers, in order that the policy of those acts may not be rendered a source of vexation and litigation to individuals. The Court cannot say that rule has been observed in this case. The act, on which the information was founded, could not have been represented at any time as an intended violation of the law, though it appears to have been an irregular act, and might, perhaps, under the words of the statute, if rightly applied, have been liable to its penal provisions. Nine years, however, had intervened, during which period this person was transferred to innocent owners; and the libel now charges only the offence of illegal *exportation*, after the time allowed for ordinary prosecutions had elapsed. The 47th section of 5 G. 4. c. 113. fixes the term of five years for ordinary prosecutions; but appears to be indefinitely retrospective as to slaves, which “have been, or shall at any time have been illegally *imported*.” This is not a case of that kind, according to the precise terms of that section in their just and natural construction. The crown officers have not advised an appearance in support of the sentence, and have thereby virtually expressed their opinion that the sentence of the Court below cannot be supported.

The appeal has been prosecuted in *pœnam*, there being no one to defend the sentence, and impress on my mind any other construction of the statute than what I have assigned to it: I feel myself bound, therefore, to reverse the judgment; but I shall not allow the costs of the appeal.

THE SLAVE,
FANNY FORD.

July 18th,
1822.

TWO SLAVES.

Dec. 1st,
1823.

THIS was an appeal from the Vice-Admiralty Court of *St. Christopher's*. Two slaves, *Betsy Johnston* and *Emma Dowdy*, were alleged to have been seized in the port of *Basseterre* by the searcher of H. M. customs, and were proceeded against under the provisions of the 5 G. 4. c. 113. s. 2. as forfeited by reason of an unlawful importation into that island, in a schooner called the *Selina*.

In an affidavit of *William Baker*, the master of the schooner, it was stated, "that on the evening of the day following that on which he sailed from *Roseau*, in the island of *Dominica*, to which port the schooner belonged, bound for *Wilmington* in *North Carolina*, he was informed by one of his crew that there were two women concealed in the fore-castle; that he immediately sent for them, and discovered that they were slaves belonging to *Dominica*; that he then endeavoured to reach the island of *Montserrat*, but without effect, as the wind was contrary; and he worked into *St. Kitt's*, being the nearest *British* port he could make,

Where, on a voyage to *North Carolina* from *Roseau* (a port in *Dominica* to which the vessel belonged), the master, discovering two slaves, from *Dominica*, on board, landed and delivered them up at *St. Kitt's*, the nearest *British* port he could reach, such an importation was not held to amount to a forfeiture under stat. 5 G. 4. c. 113.; and the superior Court, upon an appeal on behalf of the Crown, holding that the master was ignorant of the slaves being on board, and that the importation arose from unavoidable necessity,

declined to disturb the sentence, though it was undefended on the part of the owners.

TWO SLAVES.

Dec. 1st,
1828.

where he brought the slaves before a magistrate who committed them to gaol." This affidavit and two certificates of registration, transmitted from *Dominica*, for the purpose of identifying the slaves, were allowed to be filed, and received in lieu of a regular claim being interposed. The Judge of the Vice-Admiralty Court having declined to pronounce the slaves forfeited, an appeal was prosecuted to this Court: and, after the usual proceedings, *in pœnam*, for want of an appearance on the part of the owners, the King's Advocate prayed that the sentence should be reversed.

JUDGMENT.

Sir *Christopher Robinson*. — The offence charged has arisen solely out of the deception practised on the master of the vessel, who appears to have been entirely ignorant that these persons were on board; and he is not contradicted or impeached in any way as to the credit of his statement, and the fairness of his conduct in the whole transaction. It is, therefore, a case of unavoidable necessity, in which the slaves, being in custody, might, I conceive, have been properly delivered to their respective owners, and ought not to have been made the subject of proceedings for forfeiture under the abolition act. On these grounds I concur in the judgment of the Court below, and think that the case is not brought within the provisions of the act. The Court, therefore, declines to disturb the sentence, notwithstanding the appeal is undefended on the part of the owners.

MARGARET. TOMISON.

July 25th,
1829.

THIS was an application to pronounce a bond, given for the safe return of the *Margaret* to the port of *Hull*, to be forfeited, and the amount paid into Court for the benefit of the parties interested. The vessel had, after a voyage from *Hull* to *Riga*, returned to the port of *London* in *November* 1827. A second bond was then given to another part owner *, and the vessel sailed to *Quebec*, and upon her return having met with much bad weather, she was carried in distress, by a pilot-boat into *Plymouth*, where she was arrested by the process of this Court in suits of salvage and of wages.

The *King's Advocate* for the minority of interests. — The object of taking security will be defeated, if the vessel is not brought back to the port named in the bond, agreeably to its obligation.

Lushington contra. — The vessel having come

The Court declined to pronounce forfeited a bond given for the safe return of a vessel to a particular port of this kingdom, the vessel having been carried in distress into another port, and there arrested in suits of salvage and of wages, holding, that while the vessel was within the jurisdiction of the Court, safe and unsold, the application was premature.

* The ship was appraised by the broker employed by the Marshal of the Court, at the sum of 1,100*l.*, and bail given upon that valuation; which being now impeached on an affidavit of the part owner, that the inventory was defective, and that shares had been sold, before the last voyage, on a valuation of the ship at 1,700*l.*, and that his own broker had appraised her at 1,400*l.*, the Court permitted another valuation by a broker to be chosen by the parties interested; or, in default of agreement, by the registrar; and that the expenses of this new appraisal should be borne by the part owner.

Note. — The appraisal having been certified at 1,150*l.*, additional security was given to the amount of 18*l.* for the part-owner.

March 12th,
1828.

On the valuation of the ship being impeached, a new appraisal, to be made at the expense of the party applying, permitted.

MARGARET.

July 25th,
1829.

within the jurisdiction of the Court is returned substantially into the legal possession of the owners, and they are now in the same situation as they were originally; and if all parties cannot agree about the employment of the vessel, the minority may resort to the remedy already adopted, and apply for a renewal of their bonds in case she should be about to proceed to sea. It is impossible for her to return to the port of *Hull* at present, as she is detained at *Plymouth* by the warrant of the Court; but the master has stated in his affidavit that it is his intention to return with the vessel to *Hull* as soon as she is released.

JUDGMENT.

Sir *Christopher Robinson*. — The difficulties attending these cases are, I believe, no other than necessarily belong to the relation of co-partners in a property of this description. It is for the interests of navigation that such relation should exist, and it has been so considered in the commercial policy of all countries. It is the primary object of such engagements that the vessel should be employed; and if the owners do not agree, it would be a sacrifice of all interests, and of the first object of commercial policy, that she should be detained to perish in port. It is a condition of such co-partnership, therefore, that the majority must prevail in deciding upon the course of employment of the vessel.

The law of some countries has gone so far as to endeavour to compromise all interests by compelling, in cases of disagreement, a sale, either of the shares of the minority, or of the whole ship, at the application of a majority of the owners, and sometimes

even of a moiety of interests. Such attempts appear to have been made also in this country; but the justice of such a proceeding may be questionable. Disagreements may be fomented by it; or a forced sale at particular times may be disadvantageous or ruinous to the minority. The law of *England* has accordingly restrained the Court of Admiralty from exercising such an authority; and no other court has assumed it. On the contrary, the courts of common law and of chancery have declined to interfere between joint-tenants in respect to the possession of their ship.*

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July 25th,
1829.

It may be supposed that, wherever the practice of decreeing a sale in these cases has prevailed, and fuller powers have been exercised in compelling it, the present expedient of taking bonds for the safe return of the vessel, in cases like the present, was also adopted. For, to obtain a sale, it was required that it should be at the request of a majority, or at least of a moiety, of interests.

A bond for the ship's safe return is a remedy for a minority of copartners: and if a sale could not be enforced directly and avowedly at their request, but required the consent of a majority or moiety of owners, it could not be the intention of the law that the same thing should be done indirectly, which could not be done directly at the request of the minority. What then is the effect of this application? to transfer to the minority an

* The law of foreign countries, and the progress of the law in our country, upon this subject, may be referred to in the *Consolato del Mare*, c. 66. The *Ordonnance de la Marine*, liv. 2. tit. 8. ss. 5, 6. *Abbott on Shipping*, p. 71. *et seq.* 5th ed. The *Apollo*, TENNANT, Vol. I. 311.

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July 25th,
1829.

equivalent for their interests, and that, from the sureties to the bond, leaving the title of ownership as it was, without a power in this Court to direct a transfer of the shares of the property for which such equivalent is to be paid. This would be an anomaly in the attempt to procure a remedy in that form; and shows that if a power of such a kind is fit to be exercised by any court, it should be by courts that have greater authority than this Court to deal with the titles of property. The equitable title in the shares, so accounted for, would be in the sureties, yet the legal ownership would remain; even the regulations of the registry acts would be at variance with such an equivocal assignment of the real interest.

The more I consider this question, therefore, the more I am disposed to think that the functions of this Court have not been mutilated, with respect to this remedy, by the restrictions of modern practice, and that It does now exercise all the authority that could safely or conveniently be entrusted to it. The bond prescribes an obligation to bring back the vessel; and in some bonds, particularly in that which is printed in the appendix of *Abbott*, the terms are general, "to return," without mention of a particular port.* And it may be questionable, whether that may not be the proper extent of the remedy. When a vessel is within the protection of the country to which she belongs, she is in her general home; and the parties are restored, as to

Quære, whether bonds should not be limited "to the safe return to any port of this country."

* The more general form of bonds now used, is, "for the safe return of the ship to the port of—, being the port to which the same belongs." The words, "or any other port in *England*," are sometimes introduced:

any legal remedies, to the situation in which they stood before the departure of the vessel.

It has been said, the part owners may not know of the ship's return, and their interference may on that account be impracticable. That is a possible event; but in the circulation of intelligence in these times, on all public and commercial matters, it is not very probable; and it certainly will not furnish a sufficient reason for departing from the more prevailing rule of construction, if it is found adequate to the general object professed to be attained by this remedy. It is to be observed also, that in the *Anne*, the only instance, in recent times, in which this Court is shown to have proceeded so far as to pronounce for a forfeiture of the bond, where no actual loss had happened to the vessel, the terms of the decree were, to declare the bond forfeited "if the vessel did not return within a month to some port of the United Kingdom." * This form of words concurs with the general form of the bonds to which I have before adverted; and with the construction which I am disposed to put on the intention of the law in requiring them.

In case of loss, it seems to be generally admitted

MARGARET.

July 25th,
1829.


* The *Anne*, WHITESIDE, having arrived at *Belfast* within the specified time, and afterwards at *Whitehaven*, her proper port, the parties cited were, in *Michaelmas* term 1827, dismissed from the effect of the monition. — In the *Anne*, bond had been given "for the safe return of the ship to the port of *Whitehaven*, the port to which she belonged." In the *Waterhen*, MOULSON, after an appearance had been given by the majority of owners to a similar monition, the vessel arrived, and no further proceedings taking place, they were dismissed, and no costs given on either side. — In that case the bond was given "for the safe return of the vessel to the port of *Hull*."

January 28th,
1829.

MARGARET.

July 25th,
1839.

that they might be enforced; but perhaps then only to the extent of requiring the bond to be paid into Court: or if the Court should go further, there would be no outstanding title to be transferred; and it could not be said that the party had another remedy, unless it were shown that the courts of common law or equity would interfere in such a case. In such an event things would be in a very different state from the present; and all questions between the owners might be terminated in a full and effectual manner. The functions of this Court might be subsidiary to the final determination in higher courts; or it might go further itself, if such a proceeding should be found to be sanctioned by former practice. In the case before me the vessel is safe for the present; if she should prepare to go to sea the part owners may resort to the same remedy as before. If the ship should be sold under the decree of this Court for the payment of wages, or of salvage, it may be equivalent to destruction or loss; or, at least, that question may then be raised in a more appropriate form. For the purposes of this application it is not necessary to say what would be the final decision of the Court upon such a point. All considerations concur in supporting the objection that this application is premature, and therefore the Court rejects it.



REPORTS
OF
CASES
DETERMINED IN THE
HIGH COURT OF ADMIRALTY.

HUNTCLIFF. COLE.

July 10th,
1829.

THIS was a question relating to the asserted discharge of a bottomry bond by payment made to the agent of the bond-holder in some collateral accounts. The bond (the validity of which was not disputed) had been given at *Vera Cruz* to *Fontanges* and Co. for 250*l.*, with 12 per cent. interest, to meet the disbursements connected with the ship, and for the payment of port dues. The ship had been chartered in *London* by Mr. *Butcher*, the acting owner, to *John Hardy*, and by him consigned to *Fontanges* and Co., under letters of introduction from *Exter*, who was a secret partner with *Hardy*, but whose name did not appear in the charter-party. The name of *Exter* so becoming known to *Fontanges* and Co., that house transmitted the bond to him to procure payment. On the arrival of the ship, it was settled between the owner and the charterer that 96*l.* should be charged

A bottomry bond uncanceled and not delivered up, as paid, held not to be discharged by an agreement, or a settlement of accounts, between the owner and the charterer, that the latter should pay the bond, to which agreement the agent of the bond-holder was, as partner of the charterer, privy; but under which there was no evidence that, as agent of the bond-holder, he had acted or received the money. Bond pronounced for with costs.

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to the owner, as his proportion, to be deducted from the freight, and that the remainder be paid by the charterer to *Exter*. This deduction was accordingly made; but it did not appear that *Exter*, as agent of *Fontanges* and Co., had been a party to that agreement, or that, in that character, he had received the money or done any thing specifically under the agreement. *Hardy* and *Butcher* had applied to *Exter* to give up the bond, but he always evaded the demand. The bond-holders had written to *Exter* for the remittance of the proceeds, but without effect. Ultimately, however, he delivered up the bond to Messrs. *Harman*, the substituted agents of *Fontanges* and Co.; and in *March* 1828, a warrant was extracted by Messrs. *Harman*; but the service of it was defeated by the vessel putting to sea. The interest of *Fontanges* and Co. was then insured. In *January* 1829 the vessel was arrested at *Liverpool* on a fresh warrant; and the case now came before the Court on act on petition supported by affidavits.

On the part of the assignees of *Butcher*, who had become a bankrupt, *Dodson* and *Addams* contended that the bond had been virtually discharged by the settlement between *Butcher* and *Hardy*, and with the privity of *Exter*, as the partner of *Hardy*, and agent of *Fontanges* and Co.

Lushington and *Pickard* argued, on the part of the bond-holders — that nothing had been done that could amount to a legal discharge of the bond: and they denied the inferences attempted to be raised respecting the privity of *Exter*, and the effect attributed to his acts as against the bond-holders.

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Sir *Christopher Robinson*.—This is a bond for the small sum of 250*l.*, and the interests of the several parties from whom payment is demanded are so inconsiderable, when divided between them, that the suit must be presumed to have been defended rather from an erroneous impression of the legal effect of the acts relied on, than from any improper motive. There were in this case two parties liable for the payment of the money—the real owner, and the charterer under him, who was empowered to receive the freight and to account to the owner, according to the terms of the charter-party. *Exter*, however, was not a party to this instrument, though he appears to have been in some sort of secret partnership with *Hardy*. After he had been intrusted with the commission to obtain the payment of the bond, a private adjustment of the mode of payment of the several proportions was made by *Butcher* and *Hardy*, according to which their several shares are said to have been virtually received by, or accounted for to, *Exter*. The fact that such a settlement was proposed to be made, and acceded to, cannot be disputed; but it is not shewn in what manner *Exter* was privy to it, nor what acts were done by him to bind his principal.

Looking to the peculiar nature of bottomry bonds, as given, usually to strangers and foreigners, for the advance of money for the service of the ship in a distant port, I think it is the duty of the Court to look for the discharge of them in the simplest and most unequivocal form. If It should turn aside to averments of collateral or constructive payments, growing out of the complicated relations

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of individuals, and on disputed facts, It would destroy the security of these engagements, and lead the bond-holder into a discussion of particulars, of which he must be totally ignorant, and thus expose him to litigation, that may disappoint all his prospects of a return for the advances which he has made, and involve him in fruitless expenses.

These are considerations applicable to these particular bonds, and to the duty of the Court in enforcing them. But with respect to the common principles that govern all bonds, it is natural to look to the bond itself for the proof of payment; as it is usual to deliver up the bond, or to note the payment on the instrument itself, or in some collateral receipt. In this case neither of these ordinary proofs of payment is alleged; but it is said that special circumstances may in some cases amount to a discharge without being accompanied by direct proof of payment, and that the Court of Chancery will order bonds to be delivered up, on payment to agents or other persons, for the benefit of the bond-holder. That may be so: but the Court of Chancery may exercise powers which this Court cannot assume; and the mention of that authority reminds me that if such a remedy was thought to be attainable in this case, it should have been sought in that form. The defence rests on the affidavits of *Forsyth*, the ship-broker, of *Butcher*, of *Hardy*, and of the owner's clerk. The broker establishes the fact of the intended settlement, and the representation made by *Hardy*, that there was a secret partnership between himself and *Exter*. This, however, only explains their course of proceeding, which, so far, was natural enough; but it leaves it only as a private agree-

ment between themselves, in which the owner, who is primarily liable to the bond-holder, relies on *Hardy's* assurance that *Exter* should satisfy his proportion of the debt from the ship's funds, and makes him also the depositary of the 96*l.*, which was to be deducted from *Butcher's* freight. *Exter* got into difficulties; and it is not shewn that any thing was done to complete that arrangement. This is a great defect in the affidavit of *Hardy*, who had the means of stating all such particulars with the utmost precision. *Hardy* says only, that *Exter* was privy to the agreement, and was intrusted to collect the freight, and to pay out of it the proportion due for port charges and *Hardy's* share of the bond; but he does not even aver that *Butcher's* share of the bond was directed to be paid out of the same fund. This may be an oversight: yet still it is an imperfection in the evidence, according to their own manner of stating the case; and it shews how slightly the parties have attended to the formal and correct settlement of this account. The transaction between *Butcher* and *Hardy* is carried no further; it remains a private understanding or agreement between them, in which *Hardy* is made the agent or representative of *Butcher*; and as the money is not traced out of his hands, he may still be answerable to *Butcher*; and it is incorrect to say that the loss will all fall on the latter, as he may have his remedy against *Hardy* and against *Exter*.

If *Hardy* had become a bankrupt the day after the alleged settlement with *Butcher*, it could not have been contended that such a mode of settlement alone would have discharged *Butcher* from his obligation as owner of the ship. More was ne-

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cessary to be done, and was intended to have been done; but never was done. It is said that *Butcher* and *Hardy* repeatedly required *Exter* to give up the bond, but he evaded the demand. What is this but an acknowledgment of the owner's laches? Such conduct on the part of *Exter* could not fail to excite and justify a suspicion against him, yet nothing is done to bring matters to a specific settlement. *Hardy* might have shewn, if the fact were so, that the money accounted for to him by *Butcher* had been carried to the private account of *Exter*, so as to be at his disposal for the discharge of the bond, in his separate character as agent for *Fontanges* and Co. That would have been a natural proceeding; and if any impediment had been raised, that was the time to have had recourse to a court of equity in order to establish the payment of the bond, and to enforce its delivery or its cancellation.

The omission to resort to that remedy is important in various ways. It deprives the owner of any ground of claim on the extraordinary powers of this Court, if it possesses them; and it, moreover, casts a cloud of suspicion on the whole case, so far as concerns the acts of *Hardy*, and his belief that the money had been carried from his account, or the joint partnership account, to the private account of *Exter*, so as to be disposable for the discharge of the bond. These considerations very much weaken the defence, both in law and in fact.

It is to be recollected, also, in what state *Exter* stands, as to the verification of this account. In his letter to Mr. *Gosling*, as embodied in his affidavit, he asserts that he never had enforced the bond, and assigns, or rather insinuates, a reason, arising

from his own pecuniary difficulties, which induced him to advise *Fontanges* and Co. to place the bond in other hands; and it was, accordingly, directed to be transferred to Mr. *Harman*, by whom it is now put in suit. The very act of delivering up the bond to Mr. *Harman* is evidence to the same effect, because he never could have given it up in justice to his partner, or to the owner, if he was conscious that it had been satisfied. The partner, also, must have known this part of the case, and he ought to have made the communication to *Butcher*; and here, again, these parties might have applied to the Court of Chancery, if they had been advised that it could be done with effect.

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Reference has been made to the letters of Mr. *Fontanges*, for the purpose of extracting from them a recognition or confirmation of this agreement; and, with this view, it has been argued, that they imply a knowledge and understanding on his part that *Exter* was answerable to him for the payment of this bottomry bond, and that he had no thought of any further claim upon the owner of the ship. The expressions relied on are consistent with the supposition that the bond might have been paid; or that *Exter*, by his negligence, might have made himself responsible in the event of the owner's insolvency. But they go no further; and do not imply any belief or acquiescence, on the part of the writer, in the supposition that any thing had happened, which would discharge the owner from his liability under the bond. The facts now relied on were not communicated to *Fontanges* and Co. so as to lay any foundation for the argument, that they had recognized and confirmed the virtual payment.

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The warrant of arrest was taken out in 1828, but could not at that time be served, as the ship was absent from the country. This accounts for the interval of time, and removes the charge of delay against the bond-holder. There is also before the Court the correspondence between the proctors in this cause, which shows that *Butcher* had, upon the warrant being extracted, engaged to pay the demand; but that engagement went off upon a dispute with the bond-holder's agent as to a further charge of 29% for insurance; and the owner then resolved to try the question, as he was advised there was a probability of resisting the demand with effect.

It is said that he is not bound by that promise, and that it is not to be regarded as an acknowledgment of the debt, as he might make the promise of payment in order to avoid litigation. Still, it is proof of a doubt existing in his mind upon the validity of the discharge; and nothing has been shewn or alleged before me that establishes any solid ground of defence. It is my duty, therefore, to pronounce for the bond, and with costs.

Bond pronounced for. Costs.



LA MADONNA DELLA LETTERA.

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THIS was an application, on the part of a claimant in the Vice-Admiralty Court at *Malta*, to enforce a decree of that Court against the captor, who had ceased to be within the jurisdiction of the Admiralty Court at *Malta*, but was living in *England*. The motion was moved for on the authority of the *Picimento*, 4 Rob. 360. ; and was granted under an intimation noticed in the judgment.

Lushington for Capt. *Bligh*.

Addams, contra.

JUDGMENT.

Sir *Christopher Robinson*. — In this case there are two questions, — one affecting the jurisdiction and authority of this Court to enforce the motion; the other relating to the equity of the demand. When the motion was moved for, the Court observed upon the doubtful character of such a proceeding, and allowed its process to issue, in order that the experiment might be tried, and research be made for authorities to support such an interference by this Court in the proceedings of an inferior Court. The distinction between the case cited, and the present, was then pointed out. In the *Picimento*, this Court only proceeded to do justice in a case partially adjudicated by the Vice-Admiralty Court of the *Cape of Good Hope*, which was suppressed, and had left other parts undetermined or unexecuted. The jurisdiction of the local

The High Court of Admiralty declined, on the application of the claimant, and without letters of request, to interfere to enforce a motion to compel obedience to a decree made many years before by a Vice-Admiralty Court, for payment of a small sum as demurrage, against a captain who had ceased to be within the jurisdiction of the latter Court, and was resident in *England*.

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Court being extinguished, the general authority of this Court revived, and was proper to be maintained to prevent a total failure of justice.

In the present case there is no such reason for the interference of this Court. It might depend on many particulars of a local nature whether the sentence would in this case have been enforced at *Malta*. Circumstances of defence or exculpation might have arisen there which cannot be within the reach or application of this Court. It is not even an impossible supposition, that the proper court may even now be adjudicating on the subject, or may have decided it, if it should have happened that the captor had come within its jurisdiction. This is perhaps but an imaginary supposition, but still it is a possible objection, and one, therefore, that may be applied to illustrate the general principle.

It must be recollected, also, what the consequence might be of enforcing this monition in reviving numberless claims that may remain unsatisfied in the same manner, and to a greater extent, in different Vice-Admiralty Courts. It would be an extreme hardship on naval officers to have such questions revived against them personally in this country, when the justice or equity of the claim may perhaps in many instances have related principally to the acts of their agents; and may be rendered doubtful by lapse of time, and the want of proper information on many points that might constitute a defence.

The Court has a right to expect that it should be shown clearly from principle or precedent that such an exercise of its jurisdiction as is now required could be maintained. Nothing is produced

to that effect; and my own researches have not enabled me to satisfy myself that I could safely enforce this monition. The regulations of the prize act, during the late war, did introduce some modifications of the law on the head of subsidiary interference on the part of the High Court of Admiralty, in directing distribution and other matters arising out of the proceedings of Vice-Admiralty Courts. The inference to be drawn from these modifications is, perhaps, that such powers were not thought to belong to this Court independent of such statutable provisions. And it might be a risk in this Court, at this time, to proceed to carry them further.

I have also in my possession a minute, which was extracted many years ago from the Court books, shewing, that the occasion for such interference, though depending on facts very similar to the present case, was not then thought sufficient to support this form of application to this Court on the part of the *claimant alone*, though I am not enabled to say how that case ultimately terminated. The case to which I allude was that of the *Immaculata Conceptione* in 1748, in which a monition was prayed, on the suggestion that there had been a sentence of the Vice-Admiralty Court of *Minorca* condemning part of the cargo, and restoring other parts; that there had been no appeal, and that the order for restitution could not be enforced, as the captor was in *London*. Letters of request were exhibited from the Judge of the Vice-Admiralty Court; and it was prayed, on the part of the claimant, that this Court would issue its monition, calling on the captor to make restitution, or shew cause to the contrary. The note does not contain

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any further information as to what was ultimately done; and it would be necessary to look up the further proceedings, before the Court could venture to act upon the authority of that case, when no similar case is known to have occurred since,—certainly not within my experience of above thirty years in the practice of this Court.

On the present view of these two cases it is to be remarked, that this case does not come up to the one which I have just mentioned. It is not here asserted, that there has not been an appeal; and there are no letters of request from the Judge of the Vice-Admiralty Court, who ought, at least, to be a party to the application. Whether it would be advisable that such authority should be given in the event of any future war, must be left to be determined by those who shall advise on the expediency of such a measure when the occasion may arise. There was no provision made for such a case in the late war, and there is no instance produced in which such a power has been assumed in modern times.* These considerations induce me to decline to interfere in the present case.

On the equity of the demand, I am glad to be able to say, that it is but a slight claim, for one month's demurrage and interest on a cargo wrongly seized within the territory of a neutral power—the King of *Sardinia*. The Court at *Malta* did not condemn the captors in costs; and there are no circumstances appearing which induce me to

* On the ancient practice of letters of request, and on the execution, in this country, of a sentence of a civil law court in a foreign realm, see Sir Leoline Jenkins, vol.ii. pp.762. 788.; also Lord Holt's observations in *Green v. Walker*, 2Ld. Raym. 893. and *Ewer v. Jones*, *ibid.* 935.

think that it was an aggravated case, or more than an accidental mistake in the exercise of the rights of war. It is less therefore than the case of valuable property not restored, and stands in a more particular manner on the local experience and judgment of the Vice-Admiralty Court, with regard to many circumstances, on which the determination of the case might depend, if it had been revived in that Court.

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Capt. *Bligh* was at *Malta* twelve months shortly after the decree: his agent had come to *England* and died here; and it does not appear in what manner the justice of the case might be referable to the acts of the agent, or be now affected by the want of papers and information material to the question; and, I repeat, no proceeding was had against Capt. *Bligh* at *Malta*, when, upon his return to that station in 1810, the jurisdiction of that Court would have reached him.

The effect of the principle of limitation of time, also, under the observations made upon it in the *Mentor**, is not inapplicable to this case; and it appears, besides, that there have been two actions instituted against this officer at common law, and that they have failed only from inaccuracy of statement, or the death of one of the Plaintiffs, thus leaving a right in the representative to renew such action. There is, then, no necessary failure of justice, as the courts of common law are competent to entertain the question; and they certainly are preferable courts for cases of this description, standing on the general right of action against the person.

* 1 Rob. 179.

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The claimant is debarred by these considerations from any right to expect an extraordinary assumption of power in this Court to enforce his claim, when he has had other remedies in his reach, and has failed to pursue them effectually. On these grounds, I have the satisfaction of thinking that there is no great failure of justice to be complained of, and I may, therefore, with less reluctance decline to interfere. The amount of the claim is only 300*l.*; and if I had any influence, I should certainly think that Capt. *Bligh* had not successfully exonerated himself from that proportion of the demand that would, by his own admission, fall upon him. Whether that would be accepted, or whether it will be paid, I cannot say; but I do not think it improper to throw out the suggestion, as what the Court might be disposed to expect, if it could act with authority on the subject; but this it must decline to do, and I dismiss Capt. *Bligh*.

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DUKE OF BEDFORD. MORRIS.

A bottomry bond, given for the necessities of the voyage by an owner on board the vessel, who could not otherwise obtain money, is valid, and

supersedes a previous mortgage of the ship; the master, who was on board, but to dispossess whom a suit had been instituted, being privy and receiving the supplies as necessary, though refusing to sign the bond.

THIS was a question respecting a bottomry bond given at the *Cape of Good Hope* by the owner of the ship, who was on board, the master not being a party thereto, for securing to Messrs. *Nesbit* and *Dickson* the sum of 1700*l.* and premium

thereon at 10 per cent., payable ten days after the safe arrival of the ship at her moorings in the *Thames*, for their disbursements on account of the ship, wages of the crew, provisions, and stores. The ship arrived in safety; and payment of the bond was refused by Messrs. *Cockerell, Trail, and Co.*, mortgagees of the ship, on the grounds of objection stated in the judgment.

Lushington and *Addams* for the bond-holder.

The King's Advocate and *Dodson*, contra.

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JUDGMENT.

Sir *Christopher Robinson*. — This is the case of a bottomry-bond granted under peculiar circumstances at the *Cape of Good Hope*, by the owner, who was on board the vessel, and signed this bond without the concurrence of the master. Another principal fact in the case, is, that the vessel had been mortgaged in the usual form of mortgage of vessels by conditional assignment, before she sailed from this country. On these facts four questions are raised in objection to the bond. 1st, Whether it was competent to the owner alone, without the concurrence of the master, to give such a bond. 2dly, Whether a bond so given will, by priority, affect the interest of the mortgagees. 3dly, Whether, under the circumstances accompanying the transaction, the bondholders are chargeable with collusion, or any misconduct that will vitiate the bond: and, 4thly, Whether the supply of provisions, for which this expense was incurred, for the subsistence of the passengers on board this vessel, at the *Cape of Good Hope*, and in the prosecution of their voyage to *England*, was a proper subject of bottomry.

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The previous history of the vessel is stated in the affidavit of Mr. *Brownrigg*, a partner in the house of *Cockerell, Trail, and Co.*, who says, "that the vessel was purchased by *Thomas Stephenson*, in 1825, and mortgaged to the house of *Cockerell, Trail, and Co.* for about 6000*l.*, which was advanced to effect the purchase." The assignment was afterwards extended to cover further running advances: and it appears that there was a special power given to the house to receive all freights. The vessel sailed in *March* 1826, with *Stephenson*, the owner, on board, who is said, in the argument, to have gone on board, as if it was an incidental circumstance; whereas it is alleged, on the other side, that he went on board with a view to the management and control of the vessel, and with the approbation and consent of *Cockerell and Co.* The vessel arrived at *Calcutta*, after having sustained considerable damage in the river *Hooghley*, which occasioned repairs to the amount of 5000*l.*, which were paid for by *Stephenson* on bills drawn on *Cockerell and Co.* The vessel afterwards went on an unprofitable speculation to the *Persian Gulph*, and returned to *Bombay*, from which port she sailed on the present voyage in *March* 1828, with a cargo belonging to, or consigned to, *Cockerell and Co.*, and also with invalid soldiers and passengers on board, for whom *Stephenson* had received passage-money to the amount of 4000*l.* And it was made a subject of complaint against *Stephenson*, that he had not remitted this passage-money to the house of *Cockerell and Co.*, as he was bound to do under the assignment.

The master, who sailed from *England* in command of the vessel, had been dismissed at the

Mauritius by *Stephenson*, on a quarrel between them, and one or two other masters had also been changed for the same reason. The present master was appointed at *Bombay* in *January* 1828, and the ship sailed in *March*. When the vessel arrived off the Cape, she was found to be so much in want of provisions and water, that the master states, in his protest of the 14th of *June*, that it was imperative upon them to put into *Algoa Bay* or *Port Elizabeth* for supplies. They arrived there on the 29th of *May*, and lay there till the 10th of *August*, during which time provisions for the daily supplies were furnished by Mr. *Wyatt*, on personal credit, which was afterwards turned into a mortgage on the ship, but not in the form of bottomry: and though an appearance was given for that gentleman in this cause, it has been withdrawn; and it is mentioned only as an incident filling up the calamitous history of this vessel.

Whilst the ship lay at *Port Elizabeth*, *Stephenson* and the master quarrelled, and *Stephenson* attempted to dispossess him; and took out a citation for that purpose from the Vice-Admiralty Court at the *Cape* on the 17th of *July*; and these proceedings were depending till the 27th of *September*, when *Stephenson's* suit was dismissed. In the mean time the vessel had sailed from *Port Elizabeth* to *Table Bay* on the 10th of *August*, and arrived on the 25th. Immediately on the arrival, *Stephenson* applied to Messrs. *Dickson* and *Nisbet*, merchants and agents to *Lloyd's*, to furnish provisions for the voyage to *Europe*, and for the daily supplies of the passengers during the detention of the vessel. That house engaged to furnish the supplies on bills on *Cockerell* and

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Co., if *Stephenson* had a letter of credit on them, otherwise on bottomry; and, on a declaration on his part that he had no letters of credit, they required that the accounts should be settled, and a bottomry bond given before the vessel sailed.

This is the substance of the two or three letters annexed to the affidavit of Mr. *Dickson*, one of the bondholders, who has negatived the principal facts relied on in the act on petition as affecting the transaction. He denies the knowledge of any other funds in the possession of *Stephenson*; and the suggestion raised by the master, that the supplies were furnished from their own stores without competition, and at their own prices; and he maintains, generally and sufficiently so far as lies upon the bondholders, the fairness of the whole transaction.

The objections raised to the bond in the act on petition are; that *Nisbet* and *Dickson* knew that the ship was mortgaged to *Cockerell* and Co.; that *Stephenson* had other funds, particularly 1000*l.* in bills on the missionary society; and that, as the bond was given by *Stephenson* and not by the master, it was essentially invalid. In the argument, the conduct of *Nisbet* and *Dickson* has been represented as in collusion with *Stephenson* to the prejudice of the mortgagees, though the act does not specifically charge collusion. The evidence, which has been referred to in support of the objections, is to be found in the protests of the master at the *Cape*, and in four or five letters which passed between him and *Nisbet* and *Dickson* on the first and second of *October*. The master has not made any affidavit, having since quarrelled with the house of *Cockerell* and Co.; and, as *Stephenson* remained

at the *Cape*, the Court is without the benefit of the best and most direct information that might be material on many points.

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I have already observed, that the suit for dispossessing the master, *Morris*, was depending till the 27th of *September*. When that suit was terminated, he wrote to *Nisbet* and *Dickson* on the 1st of *October*, stating that he had been referred to them by *Stephenson* for the sea stores, and was urgent to have them shipped. He expresses also his own expectations, that they would be supplied on the personal credit of *Stephenson*, as the vessel was fully mortgaged to *Cockerell* and Co., and, more particularly, as *Nisbet* and *Dickson* had not consulted him on the mode of payment. Two letters of the 2d of *October* repeat the same thing in different words, and express his surprise on learning that the supplies were to be furnished on bottomry; though I think that must have been understood before. *Morris* observes also, "that if *Stephenson* had any funds, he should be glad that the stores should be furnished on his credit; but if not, *Stephenson* had no power to sign a bottomry-bond; and he, as master, would not do it." *Nisbet* and *Dickson* express themselves satisfied with the security offered by *Stephenson*, in terms that are a little equivocal and liable to some observation on that account, as if they were written with a design to evade *Morris*' enquiries. But, adverting to the distinct declaration of their letter of the 25th of *August*, "that they should require a bottomry-bond," and to what must have been the understanding of the parties in the daily communications that passed between them, I cannot doubt, that the master was perfectly cognizant of

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the terms on which the supplies were to be furnished: they had been in preparation during the whole time since the 25th of *August*, and were ultimately shipped on the urgent request of the master, so as to enable the vessel to have sailed on the 12th of *October*, if she had not been detained by another cause till the middle of *November*. It is to be observed also, on that passage in *Morris'* letter which refers to funds in the hands of *Stephenson*, that he does not assert there were such funds, and seems rather to taunt him with the supposition that he had no such funds, — only saying, “if he has funds, I shall be glad that the stores should be supplied on his credit.” The effect of this is material, as contradicting the suggestion, now made, that he had such funds, and that they were known to *Nisbet* and *Dickson* in such a way as would affect the bond.

It is clear, that *Morris* recognizes throughout the necessity of supplies, and does not point out any other resource than bottomry. It has been said, that *Stephenson* had the 4000*l.* received from the passage money: but that is not suggested in the act on petition, nor in the correspondence of *Morris*; and it is expressly denied by *Mr. Dickson*; and it was probably not the fact, as *Stephenson* may be supposed to have had occasion for the employment of such funds in *India*. Adverting to the result of the inferences to be derived from the correspondence, and to the general principle, that all presumption is strongly in favour of the integrity of the transaction, and that bottomry-bonds are not to be affected to the prejudice of the bondholder but on proof of the objections raised against them, I have no hesitation in over-ruling that ob-

jection, and in pronouncing, that there is nothing whatever appearing in the conduct of *Nisbet* and *Dickson* to their prejudice in this transaction.

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With respect to the nature of the supplies, I shall omit to say any thing at present. On such parts of them as might be furnished for daily consumption on land, and were never subjected to sea risk, because I do not know how great a part of the debt was incurred on that account, nor indeed whether these supplies are included in the bond; that may be a subject of distinction afterwards, if it can be sustained; but it will be necessary that the fact should be established first on a reference to the registrar and merchants, which is the prayer of both parties, if the Court should be of opinion that the bond is not invalid.

With respect to the sea stores, I see no reason for distinguishing them from any other supplies that may be necessary for the service of the ship; “pour les depens de la nef, s’il y a besoin de victuailer,”—“in causâ necessitatis, pro servandâ nave et bonis,” according to the general definition given of these bonds by writers on maritime law. The stores in this case were to be appropriated to the subsistence of the passengers, (who may be considered as *cargo* in this view,) and by whom a large payment had been made as passage money, in the nature of freight; and if that money had been received for the benefit of the mortgagees under the assignment, it removes every ground of objection to the equitable operation of this bond, as against them, for the supplies of these provisions, if the bond shall be found otherwise to affect them.

Sea stores, particularly for the subsistence of passengers, are objects of a botisary bond.

I come now to the principal objection of law,

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as to the competency of the owner alone to give a bottomry bond, in a foreign country, for necessary supplies to the ship, without the concurrence of the master. There would be no doubt, I conceive, on this point according to the general principles of the maritime law in other countries, as they are laid down in books of the highest authority, by *Pothier* *, *Emerigon* †, *Valin* ‡, and *Bynkershoek*. § And although foreign writers combine the two descriptions of bottomry together, which may produce some ambiguity as to particular expressions, I think the writers just referred to speak clearly to the same effect, as to privileged bonds of this nature granted for the necessities of the voyage, that they may be granted either by the owner or master, according to circumstances.

With regard to the law of this country, the authority of a case decided in this Court in 1801, though without opposition, seems to establish the same principle, under circumstances in which the owner was also the master of the vessel. || It would be absurd, however, to suppose that he could be considered in both characters of owner and master, as in reference to several powers. The latter must be absorbed in the former. It would be a case indeed, in that view of it, of an owner without a master on board; and, in the present case, there was a master on board; but it goes a great length towards the circumstances of the present case; and if it presents any distinction it might be this,—that where a master was present, he might deny the cause of necessity, or show

* Vol. iii. p. 97.

† Vol. ii. p. 378. et seq.

‡ *Comm. de la Marine*, liv. iii. tit. 5. art. 8. et seq.

§ Vol. vi. p. 515.

|| *Barbara*, *CHERGWIN*, 4 Rob. 1.

that the owner had other funds, or he might impeach the sincerity of the transaction in any way; and that might raise a material objection so far as third parties were affected by the transaction. But, in the present case, the master has done neither of these; he has confirmed and adopted all the acts of the owner in demanding and receiving the supplies as essentially necessary for the completion of the voyage; and he has failed to point out any other resources, or any substantial objection; he has only refused to sign the bond for fear of pledging the mortgagees, as he conceived; although he did not scruple to urge the delivery of the goods for the service of the ship, and the earning of a freight on their account. The possible distinction, therefore, is as little substantial, and as purely formal, in this case as can be conceived. Adverting also to the authority which the owner had always exercised in this ship, and with the consent of *Cockereil* and Co.; and in communication with them on the subject of the repairs at *Calcutta*; seeing that foreign writers expressly state that where there are more persons than one in authority, it may be doubtful which is master; and that where there is a supercargo, his authority might supersede the ordinary sailing master, it is very doubtful what effect is to be attributed to the mere refusal of the master, in such a case as this, to sign the bottomry bond. I must remember, too, that during the pendency of the suit to dispossess the master, it would have been very doubtful whether he could have acted with authority for this purpose. His acts might have been liable to more objections than those of the owner; and it will not be the disposition of the Court to suppose a case, in which a ship would be

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deprived of the resources of bottomry, which may be essential for the preservation of the interests of all concerned in the voyage; and for that reason it is allowed to be virtually within the power of an acting master, though not appointed by the authority of the real master.

The only doubt, which occurs to me on this point, arises from the limited jurisdiction allowed to this Court, which has been confined usually to the cases of bonds given by a master at a distance from the owners; but that would be an objection rather to the jurisdiction of the Court, than to the essential quality of the bond; and as the objection has not been raised, and may yet be raised, if it should be thought advisable, I shall not think it my duty to anticipate such an objection, after the cases to which I have referred, of bonds given by owners alone, and which have been sustained in this Court. I feel myself bound therefore to uphold this bond.

On the remaining question, how far it may affect the demands of *Cockerell* and Co. with priority, I have already adverted to the operation of the bond in protecting their interests. It is the general character of bottomry-bonds to supersede even former bonds of the same species, on the supposition that they operate for the protection of all prior interests. That must be held to be the effect of the bond in this instance; and I think it may even be doubtful, whether the mortgagees might not be sued for such expenses in another form, if the bond should be held not to affect them. For the reasons, however, which I have assigned, I pronounce generally for the validity of this bond.

Note.— The bond was paid without a reference to the registrar and merchants.

JOHN. HORN.

February 6th,
1890.

THIS was an appeal from a decision of the Vice-Admiralty Court of *Gibraltar*, where, on the 27th of *June* 1827, proceedings had been commenced by *William Cosens*, attorney of *William Cole*, the asserted sole owner of the ship *John*, to recover possession thereof from *Jacinto Isnardy*; and on the 12th of *November* the Court pronounced for the legal title of *Mr. Cole*, and decreed to him the possession. On the 26th of *November* 1827, *Isnardy* alleged an appeal to the High Court of Admiralty; but the power of attorney, authorizing his agent in this country to prosecute the appeal, did not arrive in *England* till the 1st of *December* 1828, nineteen days after the regular time for prosecuting an appeal had elapsed. On the 5th of *December*, on motion of counsel, founded upon an affidavit to the effect, that *Isnardy* was prevented from obtaining from the Court at *Gibraltar* the papers necessary to enable him sooner to prosecute the appeal, in consequence of the fever then lately prevalent at *Gibraltar*, the Court allowed the appeal to be prosecuted. An appearance was then given for *Mr. Cole*, the respondent, under protest, alleging, that leave had been given to prosecute the appeal on an *ex parte* statement, not borne out by the facts; and that it being in the power of *Isnardy* to have prosecuted his appeal in due time, no sufficient ground was laid for the special indulgence of the Court. This protest, after argument, was over-ruled, the Court observ-

In a cause of possession the Court will not examine the title of a person in *bonâ fide* possession of a vessel till it is impeached. Where the only title rests on a conditional assignment of a vessel as a security not reduced into possession, the Court of Admiralty has not jurisdiction to disturb the person actually in possession under a subsequent sale; nor does it vary the case, because the question comes before it on appeal from a Vice-Admiralty Court which has exercised the jurisdiction, more especially as the merits disclosed did not appear to warrant the decision. Sentence reversed. Vessel restored with demurrage.

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An appeal may be prosecuted after twelve months have elapsed from the sentence, the delay being occasioned by unavoidable circumstances.

ing, — “ The period of twelve months for the prosecution of an appeal is not a statutable period, but is a regulation growing out of the general law of nations and of the civil law, and which it is in the discretion of the Court to relax: in the present case, the excess of time is not such as leads the Court to suppose that the party had intended to abandon his appeal; and he alleges that he has been prevented from the due prosecution of it only by the plague or fever which raged so violently at *Gibraltar*, as to interrupt all business, and which prevented him from obtaining the papers. Some doubt is raised as to the sincerity of this excuse, but there is no dispute as to the state of the garrison; and the papers were actually sent before the expiration of the year, and arrived within a month afterwards. These circumstances induce me not to depart from my former order, and I overrule the protest.”

Mr. *Cole* having appeared absolutely, the cause was argued, on his behalf, by *Phillimore* and *Adams*; and by the *King's Advocate* and *Lushington* for the appellant.

JUDGMENT.

Sir *Christopher Robinson*. — This is a case of appeal from the Vice-Admiralty Court of *Gibraltar*, in a suit of possession, instituted there on the part of the asserted owner, to recover possession of this vessel out of the hands of another asserted owner, who had purchased the vessel in *March 1825*, from the *British* consul at *Malaga*. The circumstances are very complicated, and the evidence is not so clear and distinct as the Court is in the habit of

requiring in cases of this nature. When I have stated the principal facts of the case, two questions will arise: 1st, Whether the Vice-Admiralty Court was justified in disturbing the possession in point of jurisdiction; and, 2dly, If it was, whether that Court has rightly decided the question of title in transferring the possession to Mr. *Cole*, the asserted original owner.

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The vessel was arrested at *Gibraltar*, under the authority of the Vice-Admiralty Court, in *June* 1827: a libel was given in on the part of Mr. *Cole*, alleging a transfer to him by bill of sale from Mr. *John Maclean*, a merchant at *Gibraltar*, on or about the 23d of *June* 1820; and that he, *Cole*, had not since sold, transferred, or otherwise parted with his interest. In proof of these averments a bill of sale is exhibited, and a copy of the certificate of the former register, bearing an indorsement made by the *British* consul on the 12th of *July* 1820, at *Malaga*, certifying that it had been made to appear to him, by a bill of sale, that the vessel belonged to Mr. *Cole*. Two witnesses are examined; *Horn*, the master, in *June* 1827, who speaks only to his appointment by Mr. *Isnardy*, and to the character of the vessel at that time; and *Stokes*, the broker, who prepared the bill of sale, and who speaks to that fact.

The bill of sale purports to transfer the vessel to *Cole* from *Maclean* for the sum of 7500 hard dollars, and it is in the usual terms, but it has no date. It is said that this is a clerical error, and it may be so, as I perceive the alleged transfer in *June* 1820 is admitted in the adverse plea. It is, however, an apparent defect; and I notice it rather, because there are passages in the evidence,

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to which I shall presently advert, that make it doubtful at what time the bill of sale was actually executed: and some of the arguments have been founded on the date of the transaction; it being maintained on one side, that there having been a previous sale by *Maclean* to Mr. *Weeks* of *Malaga*, in the beginning of *June* 1820, and possession given to him, no power remained in *Maclean* to make the alleged transfer to *Cole* on the 23d of *June* 1820; and, on the other side, it is said, that *Cole* having obtained a bill of sale from *Maclean*, no private agreement could give *Weeks* any right of property from which *Isnardy's* title could be derived. I shall state the evidence that relates to this doubt as to the date when I examine the correspondence.

On the part of *Isnardy* an allegation was admitted, denying the sale to *Cole* for a valuable consideration, and pleading that a colourable document in the nature of a transfer of the vessel was executed to *Cole* by *Maclean* in *June* 1820; and that, with the full knowledge and consent of *Cole*, the vessel was transferred to various owners, and particularly to Mr. *Mark*, the *British* Consul at *Malaga*; and by him to the appellant on the 23d of *March* 1825; and that the vessel had been held ever since by the appellant, and employed as a *Gibraltar* vessel under the proper documents granted by the governor.

It is not necessary to examine, in the first instance, the title of a person in actual and *bonâ fide* ownership and possession of a vessel till it is impeached: and it is not asserted that *Isnardy's* title is otherwise defective, than as it may be superseded by *Cole's* anterior title. *Cole*, therefore, must succeed by the strength of his own title, and not

by objections to the course of transfer to *Isnardy*: and I shall assume, for the present, that it is not necessary for me to examine more particularly that part of the case.

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The witnesses, who have been examined by *Isnardy*, are persons well qualified to give information respecting the alleged transfer, though the Court has to lament that their evidence, either owing to the manner of taking it, or to some other cause, is not so satisfactory as might be desired. These witnesses are, *Cosens*, the agent and former partner of *Cole*; *Stokes*, the notary; *Sandeman*, the confidential clerk of *Maclean*; *Ferns*, the clerk of *Weeks*; and *Rixon*, one of the original *British* owners of the vessel in 1819, and who was appointed master by *Weeks*.

Cosens says, "that he received the bill of sale from *Weeks* on the 13th of *July* 1820; that it was made as the security for a debt due from *Weeks* to *Cole*, and also for the purpose of obtaining a *British* register: that *Cole* never attempted to take possession of the vessel, or otherwise acted as owner; but he adds, *that* was deferred till the vessel should arrive in *England*, to which country it was repeatedly represented by *Weeks* that the vessel should go; he says, *Cole* did not receive the earnings of the vessel, or pay any of her expenses." *Stokes* says, "the bill of sale was prepared from instructions given to him by *Maclean* and *Cole*, and that it was executed about the 23d of *June* 1820, and was then left with *Gray* and Co." It seems, therefore, not to have been transmitted to *Cole*, nor delivered to *Cosens* at that time. *Sandeman* says, "the transfer was made to *Weeks*, and the purchase-money paid by him; that possession was given to

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Weeks at *Malaga*, where the vessel was then lying ; and that, by *Weeks*' direction, a bill of sale was afterwards executed by *Maclean* to *Cole*." *Ferns* speaks to a similar effect. *Rixon* was appointed master of the vessel by *Weeks*, after the transfer to him in *June* 1820 : he received his wages from *Weeks*, and has still a demand for some part that remained unpaid : he navigated the vessel on two voyages to the *Havannah*, as he says, under her former papers in the service of *Weeks* ; the vessel was afterwards put under *Spanish* colours in 1821, when another colourable bill of sale was made by *Maclean* to a *Spanish* house, and by that house to *Weeks* ; and the original *English* register was transmitted by *Rixon* to the custom house in *London*, in order to procure its cancellation. I cannot understand how the vessel could have been so long navigated, as he describes, under her former papers without some fraud or abuse of the register acts* : but I shall not enter into that question. *Rixon* considered *Weeks* to be the owner, and had no communication with *Cole*.

This is the substance of the parol evidence :— it describes the transfer to have been made only, at the utmost, as a security or mortgage for a debt. So far as I can judge from the correspondence annexed to *Cosens*' evidence, the debt from *Weeks* to *Cole* was not due in *July* 1820 ; since in his letter of that date he speaks of balances, and remittances, as if the accounts were then clear : and it is not till the 28th of *October* of that year, that, in a letter to *Cole*, *Weeks*, after mentioning

* 26 G. 3. c. 60. 34 G. 3. c. 68. s. 22. These have been repealed by 6 G. 4. c. 110. 7 G. 4. c. 48.

“heavy drafts he has made on his *London* house,” there follows this passage: “You have the brig *John*, so that we conceive you have full satisfaction.” It does not appear how these observations were received by *Cole*; and it is a defect in the production of extracts from the correspondence that it is not accompanied by an averment that all letters, or parts of letters applying to the subject, are produced. Without such assurance the Court cannot feel itself in possession of the whole evidence that may properly belong to this case.

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There is another passage in *Weeks'* letter of the 12th of *July* relating to the bill of sale then sent to *Cosens* — it runs thus: “There is the bill of sale (for the *John*) from Mr. *Macleam* to Mr. *Cole*, which pray forward by some safe conveyance. The register has an indorsement of which we give you copy; — and now we wish to know what sort of alteration in her papers should be made, and how a new register is to be procured. A copy of the old register *is to be* in the bill of sale.” These are strange directions to be given for prospective acts at that time, relating to a vessel which is supposed to have been actually transferred to *Cole* from *Macleam*, by bill of sale, on the 23d of *June*; and this is the first passage in the evidence, to which I before alluded, that throws a doubt on the real date of that instrument. The bill of sale thus sent to *Cosens* must have been a draft only, or direction for a bill of sale, as some things are specified as then to be done, and to be inserted in that instrument. And there is a passage in a letter of *Cosens'*, of the 14th of *August* 1820, that still further confirms that supposition. *Cosens* then writes: “Brig *John*, —

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there is Mr. *Maclean's* answer, with the bill of sale." This is inconsistent with the supposition that the bill of sale had been executed on the 20th of *June*, or even with the account given by *Cosens* that he had received it in *July*; but it does accord very well with the account given by Mr. *Sandeman*, "that the transfer was first made to *Weeks*, and by his direction a bill of sale was afterwards made by *Maclean* to *Cole*."

In the correspondence of *Cole*, *Cosens* and Co., there are two other passages on which also some observation arises. In a letter of the 22d of *September* 1820, *Cole* writes thus to *Weeks*:—"If the bill of sale is properly executed, we do not see any necessity for the vessel coming to *England* merely to obtain a new register; neither do we anticipate the least difficulty in this respect, if a loss occurs, and we have to recover of the underwriters." *Cole* here discourages the sending the vessel to *England*, which does not agree with the excuse made by *Cosens* for his delay in taking possession. And the observation goes further, as it implies an acquiescence and consent that the vessel should continue in the possession of *Weeks*; and there is no appearance of any remonstrance or declaration to the contrary. There is another passage to the same effect in a letter of the 27th of *March* 1821, when the vessel had been put under *Spanish* colours, under the bill of sale executed by *Maclean* to a *Spaniard*, and from him to *Weeks*. It is a letter from *Cosens* to *Weeks*, in which he thus writes from *Gibraltar*: "*Manchego* (viz. the *Spanish* name given to the *John*). The wind is contrary for her, but we hope she will have a good voyage notwithstanding. We have paid for the

following items to your debit." This implies a further acquiescence in the ostensible ownership of *Weeks*, after the vessel had assumed a *Spanish* character, and had sailed apparently from *Gibraltar*, where *Cosens* resided, on a voyage to the *Spanish* colonies. It was argued, in answer to the objection that *Cole* had never taken possession, that it did not appear that he had the opportunity, or that the vessel was not withheld from him by *Weeks* by fraud, or under an adverse title. But these passages refute that argument.

On this view of the evidence, it is impossible to deny that there is much obscurity hanging over this transaction, both as to its nature and character, and as to the time of its execution. It is at most but a conditional assignment for a debt, not reduced to possession, nor clothed with any one act of ownership: on the contrary, the ship remained in the hands of *Weeks*, from whom the asserted interest proceeded undoubtedly, if not the title. And it is by no means clear that *Maclean* had any right in the vessel by which he could make a legal transfer to *Cole*, after he had parted with the interest, and given possession of the vessel to *Weeks*, in the manner described by the witnesses. But it is said, that the bill of sale is absolute in its terms and effect, and that the title passed thereby to *Cole*, and has not been since divested; and cases have been cited to establish that position.* These cases are very different from the present in the main point. They decided for the title, according

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* *Curtis v. Perry*, 6 Ves. 739. *Es parte Haughton*, 17 Ves. 251. *Dixon v. Ewart*, 3 Merivale, 322. *The Sisters*, 5 Rob. 155.

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to the bill of sale and certificate of registry, in exclusion of other interests; but they all agree in this, that there was no visible ownership in any one else opposed to the asserted title under the bill of sale; and that is a material distinction. That circumstance is noticed in the terms of the judgment in *Curtis v. Perry*; and in the *Sisters*, the learned Judge draws the same conclusion from the evidence. The case of *Dixon v. Ewart* has been principally relied on, as deciding that the transfer of a ship at sea vests the property in the vendee; liable only to be divested by the neglect of the vendor to make the endorsement on the certificate of registry within the ten days after the return of the ship into port. That dictum related to a sale of a vessel at sea in satisfaction of a debt, and to the fact of an intervening bankruptcy in the vendor before the return of the ship, and before the endorsement could be made on the register. However true and correct, therefore, the dictum might be with reference to those circumstances, it does not appear to me to furnish any authority that is applicable to this case. As there was no diversity of ownership appearing, the question arose between the assignees of the vendor and the purchaser, claiming under the same original title.

What, then, is the jurisdiction of the Admiralty Courts in such a case as the present? The principles of limitation are laid down by my predecessor very fully in two cases that have been cited*; and it will be more convenient to adopt his words than to multiply distinctions on this point. In the *Pitt*, Lord *Stowell* says, after many other observ-

* *The Warrior*, 2 Dod. 288. *The Pitt*, vol. i. p. 242.

ations, " There may be incidental matters, such as repairs and other expenses, requiring the application of equitable principles which the Court may not feel itself competent to administer: I may, therefore, lay it down as a rule for the conduct of this Court, that it is only in simple cases which speak for themselves that it can act with effect; but in those which, being complex, require a long and minute investigation, it cannot proceed with safety."

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 1850.

Both those cases are much stronger than the present, and much clearer in the original title, being cases of vessels sold under distress abroad, and in which no doubt existed as to the original title; yet my predecessor declined to interfere. In a cause of conditional assignment I have myself done the same.*

The utmost that can be said of this title, under the most favourable view of the evidence, is, that it was a security for a debt, or conditional assignment, or mortgage of the vessel, not reduced to possession, though in absolute terms. I can have no doubt on the point of jurisdiction, that this is not a case in which this Court would have proceeded to disturb the possession. But it is said, although this Court might not have entertained a suit of this kind, brought before it in its original jurisdiction, it will act with greater latitude and liberality in judging of the acts of the inferior court, and will be desirous to decide the case on its merits rather than on a point of form. The Court certainly would do so on mere form; but I cannot consider the power of the Court to disturb

* *The Fruit Preserver*, *suprà*, 181.

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the possession to be mere form, but rather a very substantial part of the question before me; and a loose determination on my part on this point could not fail to increase proceedings of the same kind in the widely-extended Vice-Admiralty Courts of this country in distant parts of the world. The mischief of encouraging such a practice would be much greater than any inconvenience that might attend the exceeding of jurisdiction with which this Court might be chargeable in an original case, which might be either sanctioned or corrected by the superior Courts in a short time. But in cases arising in distant settlements much time must elapse, and great inconvenience must be occasioned to the party, before such an error can be set right by appeal.

For these reasons, I feel myself bound to decide this case distinctly on the question of jurisdiction; saying, at the same time, that if I were disposed to go further, and decide on the merits, I do not see any conclusion to which I should be likely to arrive, that would support the sentence. I can safely say that I could not decide in favour of Mr. *Cole's* title, such as it appears on these proceedings; and it would require a stronger power of construction than this Court possesses, and the means of obtaining much further information than I can derive from this evidence, to form a more positive opinion on the bare title of property which is said to exist in Mr. *Cole* under this bill of sale. I must, therefore, reverse the sentence, and pronounce for the restitution of the vessel to the former possessor. And, as he has been dispossessed of his vessel, which has been in the hands of Mr. *Cole*, as I am informed, under the sentence

for two or three years, I should not do full justice if I did not pronounce also for compensation, in the nature of demurrage, and refer the amount to the registrar and merchants. I decree this not as vindictive damages, but as virtually a part of the interest in dispute. I do not condemn the party in costs, as it is not usual in reversing a sentence, unless under special circumstances. I am willing to presume that every thing has been done from proper motives; but, as I think the judgment of the Court below is founded on erroneous principles, or on incorrect information, it is my duty to reverse it, and award to the party such relief as may amount to an equitable compensation for the injury which he has sustained.

JOHN . . .

 February 6th,
 1880.

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ZEPHERINA. LIMA.

March 2d,
 1880.

THIS was a slave trader captured on the 14th of September 1828, after a joint chase by H. M. S. *Primrose*, and H. M. armed brig *Black Joke*, attached to and acting as a tender to H. M. S. *Sybille*, *W. A. Collier*, commander, the commodore of the squadron on the coast of *Africa*, and officered and manned from the *Sybille*. On a monition having been served calling upon the commander, officers, and crew of the *Primrose* to shew cause why the *Sybille* should not share conjointly with the *Primrose* and the *Black Joke*, the interest of the *Sybille* was denied, and was pleaded in an allegation de-

In joint captures, only the actual force present shares in the prize: therefore when a tender of one ship was joint captor with another ship, the prize was shared proportionably between the capturing ship and the tender; but the tender's share, under the Order in Council, 30th of June 1827.

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1850.is distributable
among the
whole of the
ship's company.

tailing the chase and capture, as set forth in the logs of the *Primrose* and *Black Joke*.*

The *King's Advocate* and *Phillimore* for the *Primrose*.

Dodson and *Addams* for the *Sybille*.

JUDGMENT.

Sir *Christopher Robinson*.—This is a claim of joint capture on the part of H. M. S. the *Sybille*, to share in the proceeds of the captured vessel, and in the bounty granted for slaves, in virtue of the co-operation of the hired armed tender, the *Black Joke*, which was a joint chaser, and, in some sense, as maintained in the argument, an actual captor. The connection between the *Sybille* and the tender is established by the authority of the Admiralty; and, therefore, no question arises on that point; and the interest of the tender, or of the *Sybille*, in the proportion of the tender's force, is not denied.

The whole question depends on the construction of the Order in Council of the 30th of *June* 1827, for the distribution of such captures, which directs, "that all rewards for arrests and seizures made by tenders employed by the order of the Lord High Admiral, or of the commissioners for executing that office for the time being, or by boats or officers belonging to and detached from H. M. ships and vessels, are to be shared by the officers and men of the ship or vessel to which such boats or officers belong, in the same manner as if the seizure was made by the said ship or vessel." It

* The log of the *Black Joke* was, upon the allegation coming on for debate, opposed as inadmissible, and rejected by the Court.

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is said that these terms are absolute, and entitle the *Sybille* to share as if the capture had been made by that ship herself; and much stress is laid on the averment that the *Black Joke* is to be considered as an actual captor, and not merely as a constructive joint captor, from being only in sight. In the case of the *Aviso* * my predecessor doubted whether the mere constructive service of being in sight alone, would be applicable to the capture of slave ships under the conventions with foreign powers; and, therefore, all claims of joint capture in this class of cases must partake of the merit of actual assistance and of actual capture, so far as that term can be applied to any other than the immediate taker. But there is no question of that kind raised in this case, as the services are admitted to be those of efficient co-operation in the chase and in the capture. But, as it will be convenient to clear away all ambiguity in the use of the terms, I will briefly refer to the facts of the case.

The prize was a *Brazilian* slave ship, liable to capture under the convention with *Brazil*, and has been condemned at *Sierra Leone* by the *British* and *Brazilian* mixed commission under the treaty. She had been discovered by the *Primrose* about nine o'clock in the morning, and had been chased throughout the day; but as the chase was to windward, it is said the *Primrose* had not gained much on her, and would probably not have come up with her before night. About three o'clock in the afternoon the *Black Joke* came in sight from another quarter; she joined in the chase, and assisted materially in causing the prize

* *Suprà*, p. 31.

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1830.

to change her course in the direction of the *Primrose*; and about six in the evening, the three vessels were within half a mile of each other, when the *Primrose* fired, and the prize struck or surrendered to the *Primrose*. Both ships came up to the prize, and some of the crew of the *Black Joke* were put on board, as part of the prize crew, to conduct her to *Sierra Leone*; and there is no doubt that the tender was actually contributing to the capture, and, in that sense, an actual joint captor.

But the counsel for the *Sybille* attribute to this case, under the term "actual captor," all the consequences that would attend a sole and exclusive capture by a tender attached to one of H. M. ships. They admit there might be a difference in cases of mere constructive assistance; but they contend that the words of the order are imperative in respect to *seizures made by tenders*, and that this seizure was so made by the *Black Joke*. But, in order to see in what sense the terms relied upon are to be interpreted, it may be proper to inquire, what are the principles of law applicable to such cases, independent of the order? It has, I believe, been the invariable practice of the prize courts to hold joint captors entitled to share according to their respective forces present at the capture; and where efficient services have been rendered by tenders not attached, as in the case of the *Melomane**, or by other non-commissioned vessels, the condemnation of their proportion, so calculated, has passed to the Admiralty; but no greater proportion has ever so passed, in cases of joint capture, than ac-

* 5 Rob. 41.

ording to the amount of force present, and so contributing to the capture. That has been the invariable rule of practice, and is agreeable to the principles of natural equity and justice. If that is admitted, and I have not heard it contradicted, it will afford a rule of construction to the order, if it is ambiguous or obscure; and it will be my duty not to depart from so equitable a principle, unless constrained by terms that are perfectly clear and unequivocal.

The clause referred to appears first in that part of the order which relates to revenue seizures, in which the incidents of joint capture are not generally contemplated. It is afterwards applied to slave cases by general reference; and there may be something, perhaps, in this consideration that points rather to a limited interpretation of its terms. That clause directs, "that seizures made by tenders shall be shared with the ship to which the tender belongs, as if the ship had made the capture." "Seizures made by tenders" may be either such as are made by tenders alone, or in the proportion attributed to tenders in cases of joint capture. It is not necessary to go further to put an adequate construction on the terms of the order. In the former class of cases, it may be truly said, in the words of Lord *Stowell*, "When a ship takes by her boats or tender, she does all she could have done if present." But in joint capture the consequence may not be the same, as the contest may be more severe and dangerous to the joint captor than it would have been if the ship herself had been present. When it is said, therefore, that by the terms of the order the ship is to be considered as present, it should be remembered, that cannot

ZEPHYRINA.

March 24,
1830.

ZEPHERINA.March 2d,
1830.

be, to the effect of rendering equal service ; and it would be unjust to the joint captor to adopt that construction for the purpose of giving to another party a share in the prize, disproportioned to the force actually contributing to the capture. But in applying the order only to such proportions of seizures as may be attributed to the assistance rendered by tenders in cases of joint capture, no injustice will be done. The order is, indeed, in this respect, only declaratory of the general principle of law, and may, therefore, be more safely interpreted by it. If the order could be applied more absolutely and without qualification, the same argument might be used to entitle the whole ship's crew, even in cases of a wilful departure of the ship from the scene of action, in pursuit of some other object, which would be unreasonable, and contrary to all principle.

Something has been said of the hardship sustained by the tender, in having her small proportion distributed with the whole crew ; but that, I conceive, to have been the state of the old law ; and there is, I presume, some reciprocity between parties so detached, which may further remove this objection. On the whole, I am clearly of opinion that this allegation will not entitle the *Sybille* to share in the manner pleaded, and, therefore, it will be of no use to admit it to proof.

Allegation rejected.

On the 12th of *November* an application, that the expenses incurred on behalf of the *Sybille* should be paid out of the bounties, was opposed and rejected.

GENERAL PALMER. THOMAS.

May 22d,
1830.

THIS was an appeal from an award of five commissioners of the cinque ports, in a case of salvage rendered off *Margate* to a valuable *East India* homeward bound ship, upwards of 500 tons burthen. The award detailed the circumstances, from which it did not appear, that there had been any material disputes before the commissioners respecting the facts, or that any proofs had been submitted to them beyond the respective statements of the salvors and of the captain; but, on the appeal, an act on petition supported by affidavits was introduced.*

The Court, on appeal from an award of salvage, reversed the award, considering the amount excessive, as the service had not been attended by much labour or danger; but allowed the salvors their costs.

It appeared from the commissioners' award, that the ship had anchored off *Margate* on the 22d of *November* 1829; on the night of that day the weather became very squally, and the wind blew a hurricane during the whole of the next day: and on the morning of the 24th, the ship parted from her small bower anchor. The master hoisted a signal for an anchor and cable, which was interpreted to be a signal of distress: and two luggers, the *Liberty* and *King George* of *Margate*, put off to her assistance. Six men from the *Liberty* went on board, and the *King George* returned for an anchor and

* Upon the opening of the case the Court observed, that it was improper to treat an appeal of this nature as open to the introduction of fresh matter by act on petition, and affidavits *de novo*: that it was a practice which ought to be discouraged, and should not again be resorted to without an application to the Court.

On an appeal from an award of salvage, new matter should not be introduced without special leave from the Court.

GENERAL
PALMER.

May 22d,
1880.

chain cable. The pilot, who had come on board in the *Downs*, then advised that the ship should be run on the mud in *Whitstable Bay*, about eighteen miles above *Margate*; and the men of the *Liberty* undertook that charge, and performed it successfully. After lying there in safety for two days, the ship was assisted by a steam boat and removed to *London* without damage. The *King George*, being unable to carry out the anchor and cable, from the weight thereof and the state of the weather, employed another lugger to take part of the cable, and they, at great risk, proceeded together to the ship; and in the afternoon of the same day delivered the anchor and cable on board. The ship and cargo were valued at 30,000*l.*: the salvors were in number fifty-one, and the commissioners awarded 1000*l.* generally to all the salvors. The owners appealed, and made a tender of 500*l.*

The *King's Advocate* and *Phillimore* in support of the appeal.

Dodson and *Addams* for the salvors.

JUDGMENT.

Sir *Christopher Robinson*—after recapitulating the above facts,—observed, that the award was faulty in not having discriminated more particularly between the services of the different parties. One lugger never approached the ship before she was safe on shore, and then only for the purpose of helping to bring out the chain cable. The *King George* could not be said to have done much more, though that lugger had gone off to the ship on the signal made by the master: yet all three boats and their crews, amounting to fifty-one men, were treated on the same footing as principal

salvors, as in a case of common service, by which the award was necessarily increased. The services of the *Liberty* were important, and, to a certain extent, highly meritorious. To steer a large and valuable ship, full of cargo and passengers, for a considerable distance, for the purpose of laying her on shore, was a service of responsibility which required experience, firmness of mind, and great promptitude and vigilance to execute it successfully. So far the principal salvors were entitled to be considered as highly meritorious. Still it was a limited service, not attended by much labour or danger. If the case had been originally before the Court, it would not have given more than the sum tendered; but would have made a different distribution of the sum. As this had not been done below, and as the case had hitherto proceeded as a common interest, this Court would not now disturb the award in that respect. But thinking the tender sufficient, the Court should reverse the amount of the award and give 500*l.*, with an additional 100*l.* to the *Liberty* for the services she had rendered, with the expenses incurred both in this Court and before the commissioners.

GENERAL
PALMER.

May 22d,
1830.

Award reversed.



June 16th,
1830.

ADAH. MARTIN.

A ship arriving at the entrance of the *West India Docks* too late to be received into the docks that tide, is not liable under the table of remuneration to Cinque Port pilots annexed to 6 G. 4. c. 125. to an extra charge of pilotage for "docking" on the next tide.

THIS was a case of pilotage service. This vessel, drawing eleven feet water, and of 147 tons, was conducted by a Cinque Port pilot from *Dungeness to London*; and on her arrival at *Blackwall*, owing to the state of the tide, she could not be received within the *West India Docks*, her place of destination, until the following day: she was accordingly moored at the entrance of the docks till the next day at noon, when she entered the docks. The pilot claimed 15*s.* in addition to his principal wages, as an usual remuneration for the delay that had intervened between the ship's arrival and her final mooring in the docks.*

Phillimore, for the pilot.

Dodson, contrà.

* When the pilot quitted the vessel, the master gave him an order upon the owner's agent for 1*l.* 4*s.* 9*d.*, his regular wages, and for a further sum of 15*s.* for "docking."

The 6 G. 4. c. 125. (pilotage act) s. 25. directs: "And be it further enacted, that from and after the passing of this act, the respective rates or prices hereinafter enumerated in the tables marked (A and B) respectively in the schedule marked (A) to this act annexed, shall and may be lawfully demanded and received by any pilot licensed or to be licensed by the corporation of the Trinity House or by the lord warden of the Cinque Ports and constable of *Dover Castle* for the time being, or his lieutenant for the time being respectively, for the piloting or conducting of any ship or vessel from place to place as expressed in the said tables respectively; that is to say, the respective rates or prices enumerated in the said table marked (A) shall and may be demanded and received by any pilot

JUDGMENT.

Sir *Christopher Robinson*. — This is a claim for pilot services, in which neither the services nor the principal wages are disputed. But a question is raised respecting a demand of 15s. for docking the vessel on the day after her arrival, as the tide was too far spent, when she reached *Blackwall*, to allow her then to go into dock : she was therefore moored at the entrance of the docks, and taken in the next day at two o'clock. It may be presumed, from the smallness of the immediate interest in litigation, that the principal and real object of the parties is to obtain a construction of the 6 G. 4. c. 125., which regulates the pilot service, but does not provide specifically for a case like the present. The sum of 15s. is allowed in table (A)*, annexed to the act, for Trinity House pilots, for

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 June 16th,
1830.

licensed or to be licensed by the said corporation, and the respective rates or prices enumerated in the said table marked (B), shall and may be demanded and received by any pilot licensed or to be licensed by the said lord warden of the Cinque Ports and constable of *Dover Castle* for the time being, or his lieutenant for the time being ; and no greater or less rates or prices, or other reward or emolument, shall under any pretence whatever be demanded, solicited, received, paid, or offered, than such rates or prices, on pain of forfeiting 10*l.* for every such offence, as well by the person demanding, soliciting, or receiving, as also by the person paying or offering such greater or less rate or price, reward or emolument."

Section 26. provides, that the rates may be varied by the Trinity House and lord warden of the Cinque Ports respectively, with consent of the privy council.

* In table (A) there were also different rates for pilotage from "*Long Reach to Woolwich or Blackwall*;" from *Long Reach* to moorings or *London Docks*." But in table (B) the rates were general, as from "*The Downs to Blackwall or London*."

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1830.

removing a vessel "from her moorings to a dry or wet dock;" but there is no mention of dock or moorings in table (B) for Cinque Port pilots. I am inclined, however, to think, that these two tables, supplied from the two authorities of the Trinity House and the Corporation of the Cinque Port pilots, as relating to the same subject, ought to be considered together, and interpreted by the same rule, so far as may be consistent with their objects; and, therefore, if I should think that any extra remuneration is due, I shall have no difficulty in adopting the allowance of 15s. as set forth in the Trinity House table. It is my intention, in the remarks which I shall have to make, to compare the two tables, and use them for mutual elucidation. As neither the act of parliament nor either of the tables in schedule (A) specifies this particular service, affidavits have been introduced to support the construction for which the parties severally contend. On the part of the pilot there is his own affidavit, and the affidavit of another Cinque Port pilot; and they swear, that whenever a ship has been docked not on the day of arrival, but on a subsequent day, an additional remuneration of 15s. has been received. On the other side there are the affidavits of Messrs. *Geddes*, the agents of the ship, who swear that they have never paid an additional remuneration, unless the vessel has been detained two or more days. On one side, therefore, docking on the day of arrival is admitted to be the duty of the pilot; and on the other, docking after the second day is admitted to entitle him to compensation. That leaves this particular question undetermined; and the only disputed point respects the docking on

the next day, or the next working tide, as it may be called, when the vessel cannot go in on the day of arrival.

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1820.

It is inconvenient, undoubtedly, that such a question should have remained so long subject to such contradictory representations: and looking to the powers of the two corporations to make additional regulations, I thought the question might have received an interpretation from some authority exercised by them: and under that impression the Court gave leave to bring in further information to that effect. Nothing, however, of that kind has been introduced; and therefore the question must be decided on the statute and the schedules annexed, with such elucidation only as may be deduced from general principles of law.

The 6 G. 4. c. 125. is founded on a previous statute, 52 G. 3. c. 39., to which the schedule (B) was annexed verbatim as it now stands: from which I infer that it was probably a schedule in use even before that time, and not framed with reference to the changes introduced by the erection of docks.* The Cinque Port table makes no mention of docks or moorings; it assigns rates for pilotage to different stations, and sometimes at considerable intervals: it includes *Blackwall* and *London* in the same rate; whereas the Trinity House schedule (A) joins *Blackwall* and *Woolwich*, and gives a higher rate for "moorings or *London Docks*." In that schedule, therefore, the *London Docks* are assimilated to moorings, that is, I pre-

* The *West India Dock* act is the 39 G. 3. c. lxix. The *London Dock* act the 39 G. 3. c. xlvi.

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sume, the final moorings, which are usually considered as the termination of the voyage, and the completion of pilot service.

From this specification in the Trinity House schedule, I infer that docking is to be considered as equivalent to ordinary moorings. That principle agrees with the obligation to dock on the day of arrival, as admitted by the pilots, and is conformable to the general law. And I am inclined to apply the same test to this service under the Cinque Port schedule (B). What then has been done, that may be deemed equivalent to placing this vessel in dock or at her general moorings?

By the *London Dock* act it was not obligatory on all vessels to go into dock; some might go to general moorings; and I understand the schedule in that act to be so fixed for docking when required, or for bringing the vessel to her proper moorings when she was not intended to go into dock. In the *West India Dock* act, all *West India* vessels are required to go into the dock. The moorings at the entrance of those docks are appropriated to *West India* vessels; and vessels going out are not allowed to remain at those moorings longer than twenty-four hours. This vessel was moored there avowedly with the intention of going in at the next tide; not being able to enter on the day of her arrival solely in consequence of the state of the tide. The difficulty which I feel, therefore, is to say that this mooring could be considered as equivalent to the common mooring of ships at their final stations. If it is less than this, how can I add, in this case, to the rate fixed for the duty of bringing the vessel to her proper berth? It may happen that vessels may be prevented from

going into dock from various circumstances. The dock may not be able to receive them, or the owner may have some reason for delay. In such a case it would be equitable to hold that the navigation of a vessel had been completed, so far as the duty of the pilot was concerned, upon arriving at the docks; and extra allowance might then become due, as is admitted by the agents. But when the docking is prevented on the day of arrival by the state of the tide only, in what does such delay differ from any other cause of delay occurring in any other part of the voyage up the river? It is not unworthy of remark, as observed in argument, that it would be in the power of pilots to protract the voyage according to the state of the tide, and so furnish a pretence for claiming the extra allowance in every instance. It would be a wholesome interpretation of their duty, therefore, as well as a reasonable construction of the act of parliament, to hold that the duty of docking, as admitted to attach on the day of arrival, should extend to the next working tide after their arrival. Such an exposition of the act would be consistent with general principles, and harmonize very much with the representations given in the affidavits on both sides. It would confirm the obligation of docking at a proper and seasonable time, as admitted by the pilots; and it would at the same time give them the benefit of extra allowance for delays occasioned by incidents not connected with the navigation, as admitted in the affidavits of the agents. The incidents of navigation must, I conceive, all come within the compass of twenty-four hours after arrival; that is the precise period which the owners contend is included in the pilot service.

ADAM.June 16th,
1830.

АДВ.
 June 16th,
 1830.

The forty-second section imposes on pilots the obligation, under forfeiture of wages, of not leaving ships before they arrive at their place of destination; and, though this may mean primarily the general port of destination, I think it may be applied also to elucidate their duty in placing the ship at her proper station. The twenty-fifth section forbids all persons, under a penalty of 10*l.*, from giving or receiving more than the rate provided by the act: and this suggests to the Court the duty of not increasing the rates of pilotage, from mere liberality of construction, in favour of a meritorious class of persons; and reminds it, that if more was intended to be given by the schedules, the deficiency may be supplied by the Corporation Boards, and that it will be done more safely in that way than by the authority of the Court. This consideration furnishes an answer also to the claim, as attempted to be sustained, on the ground that the master had reported it to the agent as due to the pilot. Upon this part of the case it has been said, that the master was a stranger to the port of *London*, and ignorant of the statute: he might be so; but, whether he was or not, he could not authorize, on the part of the owners, the payment of more than the statute allows, without incurring the penalty of that statute. His consent, therefore, does not advance the case, but still leaves it to be decided by the proper construction of the act.

Looking to the act of parliament, as it is explained in this schedule, and elucidated by the general principles of law, I do not feel myself justified in pronouncing for the demand. On the contrary, I think the service performed on the next day was included in the general duty of pilot as an incident:

of navigation ; and, therefore, without prejudice to the claims of pilots in other cases, if they can support those claims by better authority derived from the corporation's regulations, I pronounce for the tender of wages as made, without the additional 15s. for docking.

APPE.

June 16th,
1830.

CITY OF EDINBURGH. FRASER.

January 21st,
1831.

THIS was a claim of salvage, on the part of *Edmund Dew* and twenty-four boatmen of the port of *Blakeney*, in the county of *Norfolk*, for services alleged to have been rendered to the steam packet the *City of Edinburgh*, on the 13th, 14th, and 15th of *January* 1830. The value of the vessel and cargo was 33,000*l.*; and bail was originally given in 1500*l.* A tender of 15*l.* was made on the part of the owners, who imputed to the men a wilful refusal to come off to the assistance of the vessel during the 13th and 14th, in order that the distress might be increased, and their services enhanced: the owners further alleged, that the service rendered on the 15th, after the storm had abated, and the vessel was nearly under weigh, did not exceed that of simple pilotage, in bringing the vessel into harbour.

Where pilots had not made a fair trial to get off to a vessel in distress during two days, when there might be danger and difficulty, and went off on the third, when there was no danger, and when the weather was moderate and the wind fair for the harbour, the Court, assisted by Trinity masters, pronounced that the service amounted only to pilotage, and not to salvage; and it sustained the tender, but directed the owners to pay the costs.

The Court was attended by Capt. *Chapman* and Capt. *Bradford*, two of the elder brethren of the Trinity House.

Addams for the salvors.

The *King's Advocate* and *Phillimore*, contra.

CURT OF
EDINBURGH.
January 21st,
1831.

The COURT addressed the gentlemen of the Trinity House, and observed, — that the case, *prima facie*, exhibited this peculiar circumstance, — it appeared from the salvors' own statement, that the vessel had been lying in sight off *Blakeney*, about three miles from the harbour, during two days, with a signal of distress flying, and yet that no boat went to her assistance till the 15th, — a fact hardly ever before appearing in the annals of that adventurous body of men — the coast pilots and boatmen of this country. This alone was sufficient to raise a doubt, whether all had been done that ought to have been done to raise a claim of salvage, as promptitude was a very principal ingredient in such services. The acts done on the 15th were evidently in the character of pilots; because the weather was then moderate, and a *Wells* boat had arrived first: but one of the *Blakeney* boats claimed a right to supersede that boat under a local pilot act.* It was pleaded also by the owners, that the master declared at the time that he only wanted a pilot for *Blakeney*, and would not even take one unless he was assured that there were thirteen feet of water on the bar, as he would otherwise go to the *Humber*. This statement was supported by the affidavits of some of the passengers on board, and it was not counterpleaded nor contradicted. *Dew* even admits that when he refused the offer of 10*l.* as pilot, he required only that the other boatmen, his companions, should be remunerated.

* An action for salvage was also entered against the *City of Edinburgh* on the part of twelve men of the port of *Wells*; but the Court held that their claim did not exceed an ordinary pilot service. It therefore pronounced for 50*l.*, the sum tendered, and costs.

THE HIGH COURT OF ADMIRALTY.

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The immediate service on the 15th was therefore principally of the nature of pilotage; but it was contended that they had first signaled the master to go back on his attempt to enter the harbour on the 13th; that the men had continued on the watch for two nights, and had been prevented from going off only by the violence of the storm and the extreme danger of such an attempt; that all these efforts, therefore, and the service afterwards rendered on the 15th, were to be considered as a continued and combined salvage service. On the other side it was alleged, that the men had delayed their assistance when it was wanted, saying that it was not worth while to go off till a signal of distress was hoisted; and that the claimants had actually prevented, by force, one boat from going off to assist. That this last averment was not so distinctly pleaded and proved as it ought to have been: but the representation on the part of the owner was sufficiently supported by the ostensible circumstances of the case, to render it a question of very great importance in this class of cases, to establish how such conduct ought to be viewed by the Court. There were contradictory affidavits as to the possibility of going off; the men asserted that the boats did go off on the first practicable opportunity, and that they could not have gone before without almost certain destruction. The Court was glad, therefore, to be assisted in such a case by gentlemen conversant with the navigation of the coast, whose experience would enable them to appreciate duly every circumstance that might afford a test of the truth between such opposite statements.

The Court was disposed to adopt the issue sug-

CITY OF
LONDON.
January 27th,
1861.

CURT OF
EDINBURGH.
January 21st,
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THE HIGH COURT OF ADMIRALTY.

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CITY OF
EXETER.
January 27th,
1861.

March 2d,
1831.

JANE. HUDSON.

Where the master of a whaler, and a boat's crew of five men had gone, at the imminent peril of their lives, to assist a vessel at sea dismasted, with the water making a breach over her; when they assisted in rigging a jury mast, and afterwards towed the vessel during six days to Plymouth, the Court awarded, out of 7000*l.*, 1200*l.*, viz. 700*l.* to the owners for demurrage, repairs, risks, and all expenses; 200*l.* to the master, and 20*l.* to each boatman, and the rest of the crew to share the remainder according to their interest in the voyage.

THIS was a case of salvage rendered to an homeward bound *West Indiaman*, the *Jane*, in December 1830, occasioning the detention of the salving ship, a *South Sea* whaler, which accompanied the vessel to *England*, and incurred a demurrage of three weeks, and other considerable expenses. The *Jane* was 250 tons, and the *Rover* 400 tons burthen; and thirty-three men. The agreed value of the *Jane* and her cargo was 7000*l.* The owners had tendered 500*l.*, with all costs, as well as the expenses of the *Rover's* repairs.

The *King's Advocate* and *Addams* for the salvors.

Dodson and *Matcham*, contra.

JUDGMENT.

Sir Christopher Robinson.— This is a claim of salvage, founded on very meritorious services which are admitted on all sides, and therefore the Court has comparatively an easy duty to perform: it has only to fix and establish the degree of merit, and the amount of reward consequent thereon, from evidence which is in some respects contradictory, but differing more in words and intention than in reality and substance.

It appears that the *Jane* was returning from *Berbice* with a cargo of *West India* produce, and had encountered violent gales on the 6th of *December*, which had dismasted her, broken in her bulwarks, and done other considerable damage.

She had put up a trysail, or spread some canvass, by which she had continued on her voyage till the 7th of *December*, when a sea broke it away, and reduced her to a very helpless state. Three or four men were disabled from illness, and the remaining crew, which consisted altogether of eleven persons, very much fatigued and dispirited. On the 8th of *December* the master and crew of the *Rover*, an outward bound *South Sea* whaler, came in sight; and the account given by *Chambers*, the master of that vessel, is to this effect. He says, on first seeing the vessel at the distance of about three miles, dismasted, with some of her crew on the rigging making signals, and others at the pump, he thought the vessel was waterlogged: he does not say afterwards that she was actually so, but that such was the impression which her first appearance made on his mind, — that the sea was running tremendously high, with a very heavy gale; and it seems to have been a very fortunate circumstance that the *Rover* was of that class of vessels that are particularly qualified to contend with rough and tempestuous seas, from their employment in the whale fishery. The master farther says, he asked his men whether they should go to the ship, and proposed that he would go himself if others would accompany him. The crew consented, and four or five men volunteered to go with him in the boat; and so prepared were they to encounter danger, that, he says, they put off their heavy clothing, and stripped themselves to their shirts and trowsers, that they might have a better chance of saving themselves by swimming, if the boat should be swamped. They rowed to windward about three quarters of a mile, and suc-

Jama.

March 24,
1831.

JANE.

March 2d,
1831.

ceeded with great difficulty in reaching the vessel. *Chambers* boarded the vessel at the stern, the boat not being able to approach her sides: the water was making a clear breach over the ship; and the master asked *Chambers* how long he should stay in her, and whether he should take his crew out immediately, as it had been observed amongst them that the weather threatened another gale. A similar conversation passed also some time afterwards, when *Chambers* agreed to stay by the ship, and take her in tow when the weather should become more moderate. In the mean time the crew of the *Jane* proceeded, under his advice, and with his assistance, to put up something of a jury mast, with which the vessel was enabled to sail at the rate of two knots an hour. He says the master thanked him for coming on board; that he considered him as his deliverer; and that he thought he was a madman when he first saw him lowering his boat. This is confirmed by the surgeon, and by the *Plymouth* pilot, to whom *Hudson* made the same declaration. But when the master comes to make his affidavit in this cause so late as the 17th of *February* last, when the crew of the *Rover* were gone away, he denies this expression, and many of the circumstances described by the master of the *Rover*, appearing evidently to be actuated by a desire to reduce the merits of the salvors, for the purpose of lessening the claim of salvage against his owners. I am constrained to put this construction on his motives for giving an account so different from what he had before said in the presence of other witnesses. He denies that he had a signal of distress flying, and that the sea was making a breach over the ship. He says, on

perceiving the *Rover*, who had her colours flying, he did the same to show his national character, and that he only beckoned the salvors to come near that he might enquire the longitude, and speak to the persons on board: that when *Chambers* asked with his trumpet whether he should come on board, he answered “*No*,” distinctly, three times;— though the surgeon says, he declared to him that when he saw the danger which the boat was in when she had got half way, he was sorry he had beckoned to them, as he was much alarmed for their safety. He denies also that he had any intention of leaving his ship, or that he asked the question ascribed to him, as intimating a wish to be taken out; on the contrary, he says, *Chambers* proposed that measure to him; and that he discouraged it, saying, “his ship was not in a condition that rendered it necessary, and that with assistance he should be able to reach a port:” but he admits, that about noon, seeing the weather more threatening, he asked *Chambers* “what he would do with the crew, if he should be obliged to leave his ship, and where he would land them; and *Chambers* replied, “at *Madeira* :” and he also admits, that it was ultimately agreed that the *Rover* should stay by the *Jane*, and take her in tow. Now, this is the only controverted part of the case. What passed afterwards was matter of fact. *Chambers* returned to his ship: the vessels sailed together during the night, and the next morning the weather had become more moderate: ropes were passed to the *Jane*, and she was taken in tow, and so brought first to the neighbourhood of *Brest*, and afterwards to *Plymouth*, where they arrived on the 14th of *December*, the *Jane* having

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been so conducted to a place of safety from W. longitude 10°, N. latitude 47°, where the salvors first met with her.

In weighing these contradictory statements, it will be proper to consider what agrees best with the facts of the case, as they may be collected from the situation of the parties, and from sources liable to no suspicion. When the master of the *Jane* swears that he answered "No," distinctly, three times, and that he did not wish the salvors to go out of their course, I do not believe him, as such an assertion is inconsistent with the subsequent conversations and agreement, which he admits. He had no right to draw them out of their course for such an insignificant purpose as that which he assigns, and it is not probable that he should have attempted it. He says, the sea was not tremendous, though it was high; and that it did not blow a heavy gale. These are differences of words, to which it is scarcely necessary to advert. When he admits that he only expected to be able to reach a port with assistance, and describes afterwards the agreement about towing as soon as the weather should become moderate, he does in substance admit all that the salvors have said. When he swears afterwards that his ship would not have been lost if the *Rover* had not come up; that he could have raised a jury-mast, and in all probability reached *Brest* or *Plymouth* in safety without assistance, it is in direct opposition to his own acts, as described in the former parts of his evidence. If he had any reasonable hope of reaching *Brest* or *Plymouth*, on receiving only such assistance as the *Rover* might have afforded in passing, in a few hours, it was a duty to himself,

and to all parties, to have done so, and not to have brought a valuable ship many hundred miles out of her course, unnecessarily, in his service. I think, therefore, that he has sworn at least very disingenuously, and I place very little reliance on any contradiction resting solely on his evidence.

Without entering into further particulars, I have stated enough to warrant the conclusion, that the *Jane* was in a very perilous situation, and relieved from it by the very meritorious exertions of the salvors; and I think those services were rendered with very considerable risk and personal danger to the master and the men who accompanied him. As to the remaining part of the *Rover's* crew, their merit is of a more inactive kind; they consented to the attempt, and risked their common interest in the voyage, and so far acted liberally and meritoriously; but their merits cannot be ranked with those of the master and his boat's crew.

As to the owners, who are principal parties in these proceedings, the general principle of law is, that the claim of owners generally is very slight, unless, from the circumstances of the case, their property becomes exposed to danger, or they incur some real loss or inconvenience. There was no danger to their property in this case; but in the detention of their vessel, and consequential risk and expenses, I think there is a strong foundation on their part for a claim to share in the salvage. It is in evidence, that *Chambers*, being asked by the master of the *Jane*, "what would be the consequence of receiving assistance from him," replied frankly, "that salvage would be due." This answer proves the benefit of the feeling which this

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Court has always promoted, in encouraging men by hopes of reward to engage in hazardous services, when necessary for the preservation of property in distress at sea; and I presume that the master must have included the interests of his owners in this declaration, as his only justification towards them for deviating so largely from his course. I think, therefore, that the Court is bound to act up to its general principle of encouragement to the owners as well as to the men; and I shall feel it my duty to assign a reward, accordingly, on liberal principles, though with due regard to the interests of the property. Schedules have been exhibited, of the actual loss sustained by the owners of the *Rover* in repairs for damage occasioned by towing, and other expenses, and also for demurrage; and these expenses are calculated at 350*l*. These accounts may be referred to the registrars and merchants, if it is required; or, as they seem not to be denied, I will adopt the calculation as to this part of the case; and I am disposed to award, altogether, 850*l*. in addition to the other charges. But as the parties stand in very different degrees of merit, and as the master is not in *England*, I feel myself bound to enquire what will be the distribution of this reward? and, perhaps, I shall act most cautiously, if I wait to see what scheme will be proposed on the part of the owners; but, in the mean time, the Court wishes to be understood as expressing a decided opinion in favour of a specific allowance to the master and the boat's crew.

On the next Court day the owners intimated that the expenses had been more than were expressed in the schedule, and that they had incurred the risk of forfeiture of their insurance, although

the underwriters had endorsed the policy again. An affidavit was exhibited of an insurance broker to that effect; and the owners proposed to the Court, that what was allowed as remuneration might be distributed according to the rates of interest which the crews of whaling-vessels took in the profits of the voyage. A schedule of such shares was exhibited.

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The Court thought it could not detract from what it had suggested in favour of the master and his boat's crew. It entertained some doubt as to the positive forfeiture of the insurance* in all cases, by deviation to assist vessels in distress, and questioned more particularly the equity of making an allowance for a risk which had not eventually been incurred; but expressed itself desirous to satisfy the owners, if it could be done with justice to other parties.

The Court ultimately fixed the whole award at 1200*l.*; giving 200*l.* to the master, 100*l.* to his boat's crew, consisting of five men; 200*l.* to the remaining crew of the *Rover*, to be distributed according to their respective interests in the profits of the voyage; and 700*l.* to the owners, including demurrage, repairs, risks, and all expenses.

* See the *Waterloo*, BIRCH, 2 Dod. 443. In *America*, it has been decided, that such deviation does not create a forfeiture of the policy.—Kent's Commentaries on the Law of America, vol. iii. p. 16.

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VECUA. GOMEZ.

Two warrants for bounties, each for a distinct capture made by the same two vessels jointly, were made out in the joint names of their respective agents, and the proceeds paid on their joint receipts: each agent took possession of a portion of the bounties, but no regular severance or appropriation was made: one of the agents became a bankrupt with the proceeds of one warrant in his hands, the other agent is bound to distribute the proceeds of the other warrant between the two vessels.

THE *Vecua*, with her cargo and 300 slaves, and the *Ycanam*, with 380 slaves, having been condemned at *Sierra Leone*, upon the joint capture of H. M. S. *Iphigenia*, Capt. Sir R. Mends, and the *Myrmidon*, Capt. Leeke, the usual warrants for the bounty money for the slaves were made out in the joint names of Mr. Cook and Mr. Stilwell, the respective agents; and in *October* 1825, were received by Cook, as agent to the senior officer.

The warrant for the slaves on board the *Vecua* was for 3000*l.*; and the warrant on account of the *Iphigenia*, for 3800*l.*

It was asserted by *Stilwell*, that, upon a calculation of the numbers of the *Iphigenia* and *Myrmidon* respectively to share, Cook admitted that the *Myrmidon's* gross share would be about 3000*l.*; whereupon, at *Stilwell's* request, Cook delivered to him the *Vecua* warrant, and retained the other as the estimated proportion due to the *Iphigenia* for bounty on account of both the slave-ships. In Cook's affidavit the averment of such agreement was contradicted.

The warrants were paid in *October* 1825, upon joint receipts. *Stilwell* took possession of the 3000*l.*; and in *April* 1826 Cook became a bankrupt, no distribution having been made. In *July* 1830, on an affidavit of Mr. *Hancock*, the examiner of navy prize accounts, a monition was served on *Stilwell* to distribute the 3000*l.*, to exhibit his accounts, and to show cause why he should not pay at the

rate of 12 per cent. for any portion withheld from distribution.*

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An appearance was given for *Stilwell*, and the case came before the Court in *Hilary* term 1831; when, after hearing counsel, the proceedings stood over for a final decree, upon an intimation from the Court that the interests of Sir *R. Mends* in the question were very important, and that it would be desirable that they should be supported. An appearance was accordingly given for the executor of Sir *R. Mends*, a further act on petition was entered into, and fresh affidavits exhibited, to the effect set forth in the judgment.

The principal question raised upon this monition was, whether the 3000*l.* was to be distributed to the *Myrmidon* only, or, jointly, to the *Iphigenia*?

The *King's Advocate* and *Dodson*, in support of the monition.

Phillimore and *Addams*, for Mr. *Stilwell*.

Burnaby and *Nicholl*, for the executor of Sir *Robert Mends*.

JUDGMENT.

Sir *Christopher Robinson*. — This case arises out of proceedings instituted by the treasurer of the navy, in his official capacity as guardian of prize interests, calling upon Mr. *Stilwell* to distribute a sum of 3000*l.*, received by him as prize agent in 1825, being the bounty for slaves captured by H. M.'s ships, *Iphigenia* and *Myrmidon*, on the coast of *Africa* in 1822; but alleged by Mr. *Stilwell* to be appropriated exclusively to the *Myr-*

* In the act on petition the claim for penal interest was abandoned.

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midon. The 5 G. 4. c. 113., and some previous acts, granted the bounty generally to the captors; and the practice of the Treasury has been, to issue warrants directing the Exchequer to pay the sum specified to the agent or agents of the captors named in the warrant. These warrants were accordingly issued, on the 11th of *October*, to Mr. *Cook*, agent for the *Iphigenia*, and to Mr. *Stilwell*, agent for the *Myrmidon*; and were delivered to Mr. *Cook*, as agent for Sir *Robert Mends*, the senior officer of the capturing ships, according to the rule usually observed in such cases, — whether by right, or mere courtesy of priority, does not distinctly appear.

The facts set forth on the part of Mr. *Stilwell* are, that there was another warrant issued on the same day for 3800*l.* to the same agent, and for the same joint capturing ships, as bounty for slaves captured by them about the same time, in another vessel, the *Yeanam*; that on Mr. *Stilwell's* urgent request (intimated in argument to have arisen from doubts of Mr. *Cook's* responsibility), a calculation was made of the respective numbers in the two ships, and it was understood and admitted that the share of the *Myrmidon*, in both bounties, would be about 3000*l.*; whereupon *Cook* gave to Mr. *Stilwell* the warrant in the *Vecua*, retaining the other warrant as the estimated proportion due to the *Iphigenia* of the total amount of bounty money granted for the slaves in both vessels. On the 14th of *October* the warrants were cashed at the Exchequer, on a joint receipt being given by *Cook* and *Stilwell*, which might seem to bring back the proceeds again to the state of the interests in the respective warrants. Mr. *Stilwell* asserts, that he was preparing

lists for distribution, when *Cook* became bankrupt in *April* 1826; but it is to be lamented that the Court has no evidence of any thing that was done in the intermediate time, and previous to this event.

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When this case came on before, it did not appear in what manner the averments on the part of the *Myrmidon* were received by the *Iphigenia*, — whether they were admitted or denied; or whether any acts had been done which might be construed to recognize the exclusive title of the *Myrmidon* in this warrant. The Court, therefore, then directed the distribution of so much as was admitted to belong to the *Myrmidon*, and reserved the consideration of the remainder till notice should have been given to the representative of *Sir R. Mends* of these proceedings. An appearance has since been given for the executor of *Sir Robert Mends*, and for the officers and crew of the *Iphigenia*; and it is said that instructions for such an appearance had been given from the first, though the proctor forbore to act, not very properly, I think, till the issue of the proceedings on the part of the treasurer of the navy should be terminated. *Mr. Cook* has made an affidavit also, in which he denies that the warrant was given for distribution to the *Myrmidon* only; but asserts, that it was delivered to *Mr. Stilwell* to be distributed to both ships, and that the other warrant was retained by him to be distributed in like manner. He also denies that there was any calculation or admission of the proportion of the *Myrmidon*, or any appropriation to that effect. It is shown, also, that the claim was advanced against the *Vecua* so early as 1826, and ever since; and that *Greenwich Hospital*, under *5 G. 4. c. 107. s. 3.*, had actually claimed and re-

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ceived a dividend so early as *January 1827*, from the assignees of *Cook*, as a debt due to the two ships; and that the hospital has received other dividends since, amounting altogether to *3s. 8d.* in the pound. In all these particulars, therefore, the assertion on the part of *Mr. Stilwell* was materially contradicted. There is no acknowledgment of the claim, nor any act done from which a recognition of the asserted assignment can be inferred.

The question then is materially changed in the circumstances under which it now comes before the Court; and whatever disposition the Court might then have expressed to sanction the claim of the *Myrmidon* if it was not substantially disputed, it must now look at the proofs as they stand at present, and be guided in its judgment by a fair estimate of their comparative force and effect. The contradiction in the statement of the two agents, is undoubtedly greater than might have been expected from two gentlemen of experience in business, and of great respectability: but if the affidavits are attentively examined, the difference is not perhaps so great as appears at first sight; for although it is asserted in the correspondence with *Mr. Hancock*, that the *Vecua's* warrant was delivered as a transfer and appropriation of the *Myrmidon's* share, and for distribution to the *Myrmidon* alone, that is not stated in the affidavit of *Mr. Stilwell*, or at least it is expressed or intimated only in such general terms as are not inconsistent with the supposition that he intended to distribute the same to both ships as asserted by *Cook*; and I think the acts done by *Mr. Stilwell* in preparing to make what he calls a *pro formá* account as for both ships, imply that he

did at that time intend to make up the account in that form, although, after *Cook's* bankruptcy, he insisted on the right to make up the accounts as for a capture by the *Myrmidon* only: and I think this is not inconsistent with the notion, which might be entertained by him, that he had secured the exclusive interest in the warrant for the *Myrmidon*, by the possession which he so held.

The Court referred to the affidavits of *Cook* and *Stikwell*, and proceeded, I think the affidavits may be reconciled in this way: and I do not see how any other mode of distribution could be conformable to the provisions of 54 G. 3. c. 93., the act for the protection of prize property. It is pleaded, however, on the part of the *Myrmidon*, that the delivery of the warrant was an actual transfer, and became a vested interest in the *Myrmidon*; and it is argued to the same effect, though in rather more qualified terms, that it constituted a virtual and equitable title which the Court would not disturb. On the part of the *Iphigenia* it is contended, that there is no proof of the transfer, and that there was no transfer, and could be no transfer intended, as the agents were joint trustees for both ships, and could not sever their trusts, or separate the interests of the parties otherwise than by distribution. And this argument is founded on the authority of what the Court did in the *Taragona*.* But I think that case was essentially different; as the warrant there was for a different description of prize property — booty on a conjoint expedition, and constituted the persons trustees specifically in the body of the grant: and, there-

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* 2 Dod. 487.

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fore, although that principle was adverted to by the Court under an opinion of an eminent lawyer, the late Lord *Ellenborough*, as a consequence of such an appointment, it does not, I think, apply necessarily to an appointment like the present, in which the agents are designated only as the representatives of the respective ships: and the argument which has been pressed on that point, seemed to lead further than the counsel himself was disposed to follow it, in all its consequences. I shall, therefore, dismiss that argument. As I am not prepared to say that the agents might not have been competent to sever the property, previous to distribution, if it had been done in a distinct and regular manner, and according to the form which is, I think, recognized to that effect by the schedules annexed to the *54 G. 3. c. 93. s. 81.*, in which there is a column for the specification of the capturing ship or ships, and another of the agent or agents by whom final distribution is to be made.

The mode prescribed by the *54 G. 3. c. 93.* appears to be, that the principal agent, or the agent holding the money, shall ascertain, by comparison of prize lists, a scheme for distribution with the other agents, and the proportion of the several ships; and that they pay such proportion in gross to the respective agents, to be by them distributed to the several ships; and, in this way, the respective interests would become separate, and appropriated to the individuals to whom it belonged. It is not necessary for me to say, whether there may not be other modes of severance; that may belong, perhaps, more properly to other courts. The law contemplates no exception with reference to any such accident as has happened in this case. The danger

might have been the other way, and the sincerity of the alleged apprehension could very rarely be proved or justified. The remedy, also, does not go far enough. The final distribution could not take place till all the operations contemplated in the statute had been observed: and if you suppose different captures to be made by the same ships at different times, when changes might have taken place in the crews, as observed by Dr. *Nicholl*, the interests would not be identically the same, and would not be properly a subject of set-off, or reciprocal transfer in the form asserted to have been used and adopted in this case. What Mr. *Stilwell* states in his affidavit shows, I think, that he was acting agreeably to the form prescribed by the statute; because he says, that he proceeded immediately to calculate the proportion belonging absolutely and properly to the *Myrmidon*, being about 1000*l.*, reserving the remainder for subsequent distribution when the numbers of the *Iphigenia* could be ascertained, so that the vested interest and appropriation, that is suggested to have been made by the delivery of the warrant, could not be applied to the use of his principals, till other things connected with the other parties could be settled and established by further conference. This I consider to have been the real intention of the agents; for that Mr. *Stilwell* received the money to be distributed in form to the *Myrmidon* only, does not appear to me to be credible; and I do not see how such a form of distribution could have been consistent with the provisions of the act of parliament. In any form of real transfer it seems essential that it should be distinct and capable of proof in a direct and positive manner; for property does not

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usually pass by parol, or by mere inference: and in this case there are two transfers to be considered, the transfer of the *Vecua's* share, which is said to have passed by delivery; and the transfer of the *Myrmidon's* interest in the *Ycanam*, which is supposed to have resulted from the other by implication or silent operation of law. Suppose Mr. *Stilwell* had died, or had been lost with the *Vecua's* warrant in his possession without explanation, or had become bankrupt immediately after the delivery, what would have prevented the *Myrmidon's* crew from claiming on the *Ycanam's* warrant; or, how could the interest in that warrant have been adjudged in any other way than according to its tenor? It appears to me that *Greenwich Hospital* has claimed for the *Myrmidon* and for its own interests out of the other warrant, as a debt on the assets of Mr. *Cook's* estate; and although Mr. *Stilwell* might, as he says, not be informed of it, and may not be affected by it, it shows the inconvenience, and, I may say, the imperfection of such secret titles, when other persons are acting on the primary and the ostensible title, as the agent and the assignees, and *Greenwich Hospital* did in this case.

On the supposition, before noticed, that Mr. *Stilwell* might have become a bankrupt, how could any interests for *run* shares or forfeitures devolving on *Greenwich Hospital*, or the shares of the *Iphigenia* in that capture, have been recovered out of the equivalent supposed to have been assigned to them by this transfer in the warrant of the *Ycanam*? and yet all these resulting interests ought to be protected in any transfer of prize proceeds that can be set up in this Court, as a legal

title. In this view of the case, when it is said that the equity of the case is the law of the case, it may perhaps, with more propriety, be said, the legal title will be the equitable title; for there is no other way in which all interests in such property can be protected, at least in these Courts. In the same manner, when it is represented to be a great hardship to the crew of the *Myrmidon*, who probably relied on receiving their share from the money in Mr. *Stilwell*'s possession, and may have suffered a disappointment of those expectations, it is to be remembered, that the money could only have passed in this form, in consequence of other acts of final settlement as provided in the statutes, and in the settlement by mutual receipts, which Mr. *Stilwell* would then have made with Mr. *Cook* against money in his hand belonging to the *Myrmidon*, on the *Ycanam*'s warrant. It is, therefore, a disappointment, in consequence of something that was not done by their agents; and is a hardship, if any, of the same class of hardships as those described to have been sustained on the part of the *Iphigenia*; hardships sustained by the principals for the acts or defaults of their agents.

On these considerations, looking to the duty which the Court has to discharge of adhering to the previous and original title of the *Iphigenia*, till it is shown to be fully satisfied and discharged; and being of opinion that no such transfer is shown to have passed in this case as will have that effect, I feel bound to direct the distribution to be made to the *Iphigenia*, according to the interests conveyed to her in that warrant.

The COURT directed 1485*l.* 16*s.*, deposited by Mr. *Stilwell* in the registry, as the proportionate

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share of the *Iphigenia* in the *Vecua* warrant, (after deducting the costs of all parties in the present cause), to be paid out to Mr. *Barwis*, the substituted agent of Mr. *Cook*, and also executor of Sir *R. Mends*.

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LIGO. LIGO.

In collision, the owners are only entitled to indemnification if the damage is occasioned by the fault or misconduct of the vessel charged as the wrongdoer: therefore, the collision having arisen from the neglect of the vessel damaged, the owners of the other vessel dismissed with costs.

THIS was a cause of collision. The libel pleaded, that on the 11th of *December* 1829, the *Express*, a schooner of 114 tons, together with a brig, the *Ligo*, and several other colliers, were detained off *Flamborough Head* by the state of the wind. That about five o'clock on the evening of the 11th, the schooner, which, with the other vessels, had been tacking during the day, laid to about a mile from *Speeton Cliff*, with her head to the southward (the wind S.W. by S.), under the forestaysail, foresail, foretopsail, and mainsail; that the forestaysail was full, and the foresail hauled close to windward, with the bow line fastened to the foremast shroud; that the topsail was aback, and the mainsail scandalised (the peak downward), and the helm in the lee-becket; that after the schooner had laid to, the *Ligo* was observed to windward of the schooner, on her starboard bow, and between land and the schooner, and standing towards land on the starboard tack; that shortly afterwards the brig wore round, got the wind aft, and came to-

wards the schooner with the larboard main-braces and starboard fore-braces checked, and with all sails full, and struck the schooner *; that the vessels became entangled, and, to separate them, the lanyards of the schooner were cut; that her crew then got into the brig; the schooner drifted away, and the brig promised to tow her into *Scarborough*, but afterwards refused; that a fishing smack was then engaged to tow the schooner, but could not accomplish it, from the insufficiency of the smack's lines; and the schooner was ultimately lost.

On the part of the *Ligo* it was pleaded, that the schooner employed the fishing smack in preference to the brig; that from the unfavourable state of the weather the smack missed stays, and the towing ropes broke. In further contradiction to the libel it was alleged, that the schooner was not lying to at the time of the collision; and that the brig was on the larboard tack, with her head to the westward towards the land; that the schooner, having passed to windward, wore in about one quarter of an hour, (while the crew of the brig were setting her topsails, which were aback) in order to stand from the land, and coming suddenly on the brig, struck her on the starboard bow.

There was no material difference as to the wind; and it was not denied, that at the time of the collision one vessel could not distinguish another at the distance of a mile. Upon the whole, the wit-

* The libel did not plead in what part the schooner was struck; but her crew swore that the brig stove in the bow and carried away with her bowsprit the three starboard foremast shrouds.

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nesses on either side supported the respective pleas.

The action was entered at 1200*l*.

The *King's Advocate* and *Addams*, for the schooner.

Dodson and *Haggard*, for the brig.

The COURT (Sir *Christopher Robinson*) addressed Capt. *Brown*, and Capt. *Stephenson*, the Trinity Masters, to the effect following:—

This is a case of collision, in which a vessel, the *Express*, has been lost in consequence of that accident; and the law will support a claim for indemnification on the part of the owners of that vessel, provided it can be shown that the loss was owing to the fault or misconduct of the vessel charged as the wrongdoer. But there are two other alternatives: the fault may have been on the side of the vessel that is lost; or, the accident may have happened from unavoidable circumstances, so as to be rather a common misfortune, than a subject of blame or complaint. In many cases there are prominent features which may enable common understandings to form a judgment between them; there may be a direct course prescribed to each vessel, and the opportunity of pursuing it according to the known rules of navigation; and if those rules are not observed, a manifest test is thus furnished of the propriety or impropriety of the management of the respective vessels. But this is not such a case: in this case both vessels had been tacking and lying to within a narrow compass during the day, and continued so to do in the evening; the rules, therefore, by which their conduct and management are to be judged, will not be so apparent to common judgments. There may

be practical tests, however, to be extracted from the circumstances by persons of nautical judgment and experience; and it is a great satisfaction to the Court to be assisted by Gentlemen who will be able to draw conclusions from facts which common judgments might very imperfectly appreciate. The Court, therefore, will rely on the opinion which you may form of the whole case, and requests your particular attention to the evidence with reference to the three following points: — 1. Does the evidence furnish any decisive inference by which the Court may judge which vessel was lying to, and which was not, — as this is the plea on which both parties rely? 2. If only one vessel was lying to, does it follow that the other was the cause of the accident? And 3. Supposing that the first two questions are answered adversely to the *Ligo*, and it should be your opinion that the *Ligo* was the cause of the accident, does it follow that she was the cause of the loss? or, is any and what part of the consequences to be attributed to the delay imputed to the *Express*? This latter enquiry may be a new consideration, and may, more particularly, belong to the Court; but it is so connected with the facts of this case, that the Court would wish to have your opinion upon it, if in your judgment the consideration of it should be necessary.

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The Trinity Masters, after consultation together, delivered a written opinion, stating — 1. That the brig (the *Ligo*) was lying to, and that the *Express* was not properly lying to, — but proceeding; and that if it could be true (which they did not admit) that the schooner (the *Express*) was lying to, she was not *properly* laid to; inasmuch as her main-

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sail being scandalised, it was not properly set for the lying to, with reference to the sails which were then set on the foremast.*

2. That the collision was occasioned by the neglect or inattention of the schooner's own crew.

Sir *Christopher Robinson*. — The Court perfectly concurs in the opinion of the Trinity Masters, so far as it can form an affirmative judgment on such facts. The law requires that there should be preponderating evidence to fix the loss on the party charged, before the Court can adjudge him to make compensation; and in this case the complainant has not sufficiently sustained the burthen of proof imposed upon him. It is the duty of the Court, therefore, to dismiss the *Ligo*; and as the owners of that brig have been brought to answer at considerable expense a charge which the evidence has failed to support, they are entitled, as the Court has held in other instances, to be dismissed with their costs.†

* Dewar, one of the crew of the schooner, deposed, that the schooner's mainsail was too big; and that if it had been set for her to lye to with, it would have brought her too much up into the wind.

† See the *Catherine*, of Dover, *supra*, 154.

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ON the 3d of *December* 1830, the *Charlotta* was found a derelict off the coast of *Norfolk*. The *Greyhound* and *Morning Star*, two *Winterton* yawls, and thirty-four men went off to the wreck; they were in a few hours joined by the *Ino* with twenty men, upon which the *Greyhound* and seven men returned to the shore. On the following morning, about two hours before the derelict was brought into *Yarmouth Roads*, the revenue cutter, the *Royal Charlotte*, commanded by Lieut. *Harmer*, came up, and the principal question in the case related to the claim of this cutter to share in the salvage. The ship was of 200 tons, laden with deals and iron: and the value of ship and cargo was estimated at 2394*l.* Bail was given in 1400*l.* *Dodson* and *Nicholl* for the salvors. The *King's Advocate* and *Addams* for the cutter. *Haggard* for the claimant of the cargo.

The Court always jealously maintains the right of original salvors, unless further assistance is necessary for the preservation of the property. In a case of derelict and of great merit, the Court gave to the original salvors, the usual salvage two fifths of (the whole value) 2394*l.*, and to a revenue cutter, whose assistance was beneficial, 100*l.* Expenses out of the remaining property.

JUDGMENT.

Sir *Christopher Robinson*.—This is a case of great merit in the original salvors, which is not denied. The vessel had been abandoned by the master and crew on *Hasborough Sand* on the 2d of *December*, and on the morning of the 3d, a body of *Winterton* boatmen, or beachmen, descried her, and resolved to put off to her assistance: they went in two boats, and succeeded with difficulty in getting on board. There is no evidence on this part of the case except their own; but that may be taken

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as uncontradicted, and the Court sees no reason to make any deduction from it. They rowed through a heavy sea, and very broken and dangerous water on the sand, and boarded, not without some danger of being dashed against the vessel. They then steered the vessel with their boats for the mouth of the *Cockle* gat, about eight miles from *Yarmouth*, and anchored off the buoy at two o'clock at noon on the same day. They remained there all night, and at break of day, between seven and eight o'clock, they were weighing their anchors in order to proceed through the gat to *Yarmouth*, when a boat from a revenue cutter came up and enquired who they were, and what was the condition of the vessel. The cutter's boat went back and returned with an order from the commander to send a rope on board, that he might tow them through the gat. About the same time a *Gorleston* pilot plied them, but they declined his assistance, saying they knew the gat as well as he did. The salvors protested against the interference of the cutter as unnecessary, and some conversation passed, in which the commander is reported to have said, "he would not interfere with their interest;" or "that he did not mean to dispossess them," according to the different representations of the parties. The cutter proceeded to tow the vessel through the gat, and brought her safe to *Yarmouth* between ten and eleven o'clock; and the question between these parties is, whether any reward is due to the cutter, and in what proportion? The boatmen maintain that she is not entitled to any share; that her interference was unnecessary and obtrusive, and that the claim of the cutter should be rejected with costs.

On the part of the cutter it is alleged, that the boatmen were inexperienced, not sufficiently acquainted with navigation to conduct a vessel through the dangerous passage of the gat, and that the vessel would have been lost on the sand, if the cutter had not taken her in tow. A great number of affidavits have been exhibited on both sides, much beyond what could be necessary, and beyond what the Court approves, as they tend rather to confuse than to assist the case, and have increased the expenses very improperly.

It is established that many of the beachmen had been on a voyage to *Greenland*; had navigated fishing boats for many years, and had piloted vessels through the gat. It is therefore scarcely credible that such men should have been confused, and, as the cutter asserts, should have betrayed great ignorance in weighing anchor, without loosening the sails. The men thought themselves competent, and were acting in a matter in which their own interests were depending: and there is no reason to suppose they were not generally capable to navigate the vessel through that passage. They had reported the vessel to the chief authorities ashore; and had an opportunity of obtaining a pilot from shore, if they thought such assistance necessary; and they had declined the offer of one pilot who came up whilst they were weighing their anchor. In this, I think they were imprudent, and perhaps wrong, and that they would have discharged their duty better if they had taken a pilot for the greater security of the property. But it is still to be inferred from their conduct, that they relied on their own experience

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and knowledge of the navigation of the coast, and I see no reason to impeach their competence.

There were, however, some difficulties to be encountered in getting through the gat, in which the assistance of the cutter appears not to have been wholly useless, and the question is, whether it was a case in which the second salvors were justified in superseding the first, so as to affect either their interest or that of the owners of the derelict in the amount of salvage? The Court has been always jealous in maintaining the right of original salvors, unless it appears that further assistance is necessary for the preservation of the property. This principle was strongly held by my predecessor in the case of the *Maria Kilstrom* *, and in another case, the *Rose in June* †; in which the Court held that the original salvors were insufficient, and divided the salvage. The commander of the cutter here alleges, that it was impossible that the first salvors could have towed the vessel through the gat; and if that is established, then assistance was absolutely necessary; but it is afterwards repeated in rather weaker terms, "that their assistance in towing was not unnecessary, and was very important." This is rather a lower averment, so far as the right of the original salvors is to be considered, though the interference might not be blamable or improper, or without beneficial consequences to the owner of the property.

The navigation of the gat appears to be sometimes very difficult, owing to the setting of the tide, which flows from north to south in the direction

* Edwards, 177.

† December 5. 1809.

of the Channel, whilst the course of the vessel was N.W., with the wind at E.S.E. There was a difficulty, therefore, it is said, in steering the vessel so as to make the Channel, without danger of being drifted by the current on the eastern sand; and the salvors charge the cutter with ignorance in not making sufficient allowance for the current, and in towing too near to the south entrance: and it appears from the evidence of the pilot that there was some hailing and calling from the vessel to that effect.

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The vessel was, however, brought safely through the gat, and there are strong testimonies to the general skill and good conduct of the commander of the cutter; and I treat the charge of ignorance against him, therefore, with as little attention as those made against the salvors. I think that the services so rendered by towing through such a passage was not an unseasonable assistance, and that they were offered by the commander of the cutter with good faith and justifiable intentions. At the same time, there is the evidence of the harbour-master and of a naval officer, very competent witnesses, in favour of the original salvors, and stating that in their opinion they were fully able to have effected the bringing of the vessel into port. In such a case, I shall not detract from their merits, or deduct any portion of the two fifths which I award as the salvage usually given in derelict. But, thinking that the services of the cutter were meritorious, and might have been very beneficial in contributing to the protection of the property, I shall act on the authority of my predecessor in the case of the *Maria*, by giving a small additional reward to the cutter. The Court

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there gave 50*l.* to a king's cutter who took that vessel in tow, and 30*l.* to a pilot. In the present case I shall award 100*l.* to the revenue cutter, to be paid out of the remaining property, together with the expenses.

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DONNA BARBARA. LUIZ.

The instructions annexed to the convention with Portugal, embodied in 5 G. 4. c. 113., imply that the seizures of Portuguese slave ships are to be made under the personal direction of the commander of a ship of war: Held, therefore, that a seizure by an open boat (the crew of which was borne on the books of a king's ship), commanded by an officer of the rank required to make the search, but actually putting off from an unauthorized tender, and at a distance of 1500 miles from the king's ship, did not entitle the ship to the moiety of the proceeds or

HIS Majesty's ship *Sybille*, commanded by Sir F. A. Collyer, one of a squadron of which he was commodore, was stationed off the coast of Africa for the prevention of the slave-trade, and on the 10th of January 1829, being at the island of *Fernando Po*, the commodore dispatched one of the boats of the *Sybille*, under the first lieutenant (*Harvey*), with written instructions to seize and detain all vessels trafficking in slaves, contrary to certain treaties. On the boat reaching *Sierra Leone* on the 21st, the crew, to protect themselves from the climate, went on board the *Paul Pry*, a former slave-ship, which had been there condemned and purchased by the commodore. On the 15th of March the *Adorinta*, a Brazilian brig, captured by the *Sybille*, appeared off the entrance of the *Sierra Leone* river, in charge of Mr. Browne, a prize-master from the *Sybille*. She had in company the *Donna Barbara*, a Brazilian schooner, with a cargo of 367 slaves, shipped in violation of the treaty between this country and the Brazils. This vessel and cargo had been seized by Browne on his course to *Sierra Leone*. Lieut. *Harvey*

went off to these ships in the boat of the *Sybille*, and upon his informing *Browne* that he was not authorized to effect the seizure, and desiring him to release her, the latter returned the papers to the master of the schooner, whereupon she was seized by the boat under Lieut. *H.*'s command, carried into *S. L.*, and there condemned by the mixed commission, "as having been taken and seized by the *Paul Pry*, a tender of the *Sybille*."*

It was alleged for the *Sybille*, that this description, as a tender, was owing to some error in the institution of the proceedings; for that at the time of the seizure the *Paul Pry* remained moored a considerable distance up the river; and that the seizure being effected by a boat of the *Sybille*, detached therefrom under the command of an officer of the rank required by the treaties, and the vessel having been afterwards condemned by the commissioners appointed in virtue thereof, the commander, officers, and crew of the *Sybille* were legally entitled to one moiety of the proceeds of the schooner, and also to the bounty-money for the slaves on board.†

For the Crown the claim of the *Sybille* was denied: and it was alleged that, by the fifth article of the additional convention with *Portugal*, signed at *London* on the 28th of *July* 1817, it is expressly

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to the bounties
under 5 G. 4.
c. 113. ss. 67,
68., the slave
ship having
been con-
demned by the
competent
Court as prize
to a tender to a
king's ship.

* When this case came on in the High Court of Admiralty, it was postponed for certain papers connected with it; these were furnished by the government, and among them was the sentence of the mixed commission, which stated, "that the *Donna Barbara* was brought into Court, as a prize to the *Paul Pry*, tender to H. M. S. *Sybille*, and commanded by Lieut. *Harvey*, duly authorized and furnished with instructions to make seizures of vessels engaged in the illegal traffic of slaves."

† 5 G. 4. c. 113. s. 67, 68. — The Slave Abolition Act.

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stipulated that "the visit and detention of slave-ships shall only be effected by those *British* or *Portuguese* vessels which may form part of the two royal navies, and by those only of such vessels which are provided with the special instructions annexed, &c., and which are required to be signed for the vessels of each of the two powers by the minister of their respective marine."* That the *Paul Pry* (formerly *Arcenia*) was purchased for Sir *F. A. Collyer*, to be used as a *tender* to the *Sybille*, and that the boat of the *Sybille* was, on the 15th of *March*, in the service of the schooner, and that the *Donna Barbara*, on her arrival within the limits of the port of *Freetown*, was boarded by some of the persons belonging to the *Paul Pry*. That the memorial addressed, in *November 1829*, to the Treasury by the agents of the *Sybille*, stated, "that a tender (the *Paul Pry*) belonging to the *Sybille*, together with one of her boats, seized and detained, &c."† That at the time of the seizure the schooner had not left *Sierra Leone* since her condemnation, and had never joined or become attached to the *Sybille*‡; and that the boat so de-

* In an affidavit by Sir *F. A. Collyer*, made on the 28th of *June 1831*, he stated, "that during his command of the *African* station, he never received from the Lords of the Admiralty any orders to deliver the signed instructions required by the treaties, to the officer sent in command of the boats or tenders, save the commission and instructions he delivered to the officer appointed to command the tender named the *Black Joke*."

† The Lords of the Treasury declined to direct payment of the moiety of the proceeds and of the bounty for the slaves to the *Sybille*, and referred the memorialists to this Court, under 5 G. 4. c. 118. s. 71.

‡ Sir *F. A. Collyer*, in his instructions to Lieut. *Harvey*, directed him, on his arrival at *Sierra Leone*, to fit the *Paul Pry* for sea, and dispatch her to join him off *Whydah*.

tached as aforesaid from the *Sybille* was not and could not be authorized by Sir *F. A. C.* to make captures of slave-ships either for her own benefit or for that of the *Sybille*, then distant about 1500 miles.

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The rejoinder set forth the necessity of upholding such seizures by boats made under various contingencies; that it had been usual for the commodores to purchase and station condemned vessels off the river to receive the sick and wounded, and for shelter; that more captures were made by boats than ships, and had received the approbation of the Admiralty. That Lieut. *Harvey*, in his declaration on oath, which accompanied the *Donna Barbara's* papers, described himself as a Lieut. of H. M. S. *Sybille*, and that the capture was effected by a boat of that ship, and also stated the place where the same was effected, so that all the circumstances of the capture were under the consideration of the mixed commission court; which court, by condemning the property, and decreeing the emancipation of the slaves, finally determined the capture itself to have been legal according to the stipulations of the convention.

Addams and *Nicholl* for the *Sybille*.

The *King's Advocate* and *Dodson*, contra.

JUDGMENT.

Sir *Christopher Robinson*.—This is a proceeding on the part of Sir *F. A. Collyer*, and the officers and crew of H. M. S. *Sybille*, to enforce by the process of this Court their claim to bounties for a certain number of slaves captured in this ship, the *Donna Barbara*, and condemned under the *Brazilian* treaty by the mixed Commission Court at

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The 5 G. 4.
c. 113. s. 71.
gives the Court
of Admiralty
power to de-
cide on claims
to share in the
proceeds or
bounties in
slave captures,
although the
condemnation
has passed in
the mixed com-
mission court.

Sierra Leone ; and the Lords of the Treasury have concurred in referring the question to this Court. The act of parliament (5 G. 4. c. 113. s. 71.) gives the Court of Admiralty power to decide on claims to share in the proceeds or bounties in such captures, although the condemnation has passed in another court : and this is a jurisdiction which the Court exercises freely, so as to arrive at the real facts of the case. It did so in the *Rio Pongas* case in 1824, in which bounties were claimed for slaves captured on an inland expedition under a condemnation in general terms, that might have implied, without such examination, that bounties were due, as of course, for an ordinary capture at sea : but the Court determined against the claim, on the ground that the capture was not such as was recognised by the treaty. And, in the present case, it must exercise some enquiry in this case, because the plaintiffs themselves aver against the sentence, that there has been an error in describing the capture as made by the *Paul Pry*, as a tender to the *Sybille* ; whereas it is alleged, that the capture was actually made by the boat of the *Sybille*, independently of the interference or operation of the *Paul Pry*.

I have made these observations because an objection has been urged in argument, that as the Court at *Sierra Leone* had pronounced the capture to be legal, this Court will not impugn that sentence, or call into question any fact which may affect the legality of the sentence under the convention, as it is alleged any inquiry into the character and competency of the captors will do incidentally. This argument might raise very im-

portant questions if it was pursued. It is to be observed, that the act of parliament empowers this Court to carry into effect the sentence of the mixed Commission Court, and it may be questionable how far the Court can be required to act, ministerially, with regard to such sentences, without power of examining them on any point that may be essential to the claim on which it has to decide. This is a special case, therefore, in which I do not wish to introduce more general questions than properly belong to it. The act on petition does not deny the legality of the sentence, and it will not be necessary for me to do so. The question now to be decided does not depend on the convention alone: the claim to bounties must be founded on the further act of the *British* government in granting bounties, and on the proclamation for the distribution of them.

The facts of the capture were shortly these: the *Sybille* was lying at *Fernando Po*; and Sir *F. Augustus Collyer* had dispatched Lieut. *Harvey* with a slave ship to *Sierra Leone* for adjudication: on board the slave ship he sent at the same time a small gig, or ship's boat, and about twenty men to man another gig belonging to the *Sybille*, which had been left at *Sierra Leone* for repair. At *Sierra Leone* was lying also a ship, called the *Paul Pry*, which had been purchased by Sir *F. A. Collyer* to be used in the service of the *Sybille*, and in vague and popular language as a tender to the *Sybille*; but without any orders from the Admiralty for the appointment, and without any recognition of the Admiralty of any public character attached to that ship. She is described in the affidavit as being unarmed, and

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intended to be used as a sort of boat-house, or protection from the climate, for the boats' crew in returning down the coast; and the boats' crew were using her for that purpose at *Sierra Leone*, and made the capture by putting off from her when the prize appeared at the mouth of the harbour. It is said that there was a mistake on the part of the Court at *Sierra Leone* in making mention of the *Paul Pry* as connected with the capture, since Lieut. *Harvey* distinctly informed the agent or proctor there that the capture was made by the boat's crew of the *Sybill*. I have no doubt that that declaration was made, not in contradiction to the use of the *Paul Pry*, but as a further assurance that the captors were identically the crew of the *Sybill*, — a caution which, I perceive, the Court at *Sierra Leone* has used in other cases, in dealing with the anomalous character of tenders: for the affidavit does not state that Lieut. *Harvey* was ignorant of the description given of the capture, or that he remonstrated against it.

The bounties were first given by the 1 & 2 G. 4. in 1821. So early as 1823 a case arose in the *West Indies*, in which the use of tenders in making captures, under the *Spanish* convention, was first brought to notice in the correspondence of the *British* commissioner at the *Havannah*: and in 1824 the *Fabiana*, and in 1826 the *Nicanor* and *Principe de Guinée* occurred at *Sierra Leone*, in which it became a question how far the use of subordinate vessels by the ships of war specifically authorized to make the capture was reconcilable to the terms of the treaty. In the *Fabiana* the commissioners suspended their judgment till they were advised that they ought to proceed, as it

could not be the meaning of the treaty that every departure from the rules or instructions included in the treaty for the regulations of seizures, should vitiate the capture, as between the two countries; that the contracting parties in adopting the ships of war of the two powers reciprocally as instruments of seizure, might be supposed to have adopted the rules applied to the regulation of the naval service of the two governments respectively. That exposition of the spirit of the treaties appears to be reasonable. The treaty purports that it was to be executed according to the spirit; and there was at that time a commissioner of the foreign power, a member of the Court, who concurred in this interpretation. So stands the condemnation as relating to *Portugal*.

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In respect to our own policy in granting bounties as special rewards to H.M. ships employed under the convention, the claim must be sustained according to the rules of our own service, and the construction which has been put upon them in other cases. Now in our own service, the tenders, properly authorized, have always been considered as identified with the ship to which they are attached, even when acting at considerable distances. Such was the answer of the Admiralty in the *Nicanor* and *Principe de Guinée*, and in other cases; and those captures were sustained. The proclamation of the 30th of *June* 1827 directs accordingly, "that all rewards for arrests and seizures made by tenders employed by my order, or by the order of the Lord High Admiral, or any commissioners for executing the office of Lord High Admiral for the time being, or by boats or officers belonging to and detached from H.M.

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ships and vessels, are to be shared by the officers and men of the ship or vessel to which such boat or officers belong, in the same manner as if the seizure was made by the said ship or vessel.”

If the *Paul Pry* had been a tender so employed, the capture made from her might have been sustained as made by her, and the *Sybillie* might have been entitled under the proclamation: but that ground has not been relied on. But it is said the boat's crew are to be considered in their immediate relation to the *Sybillie*, notwithstanding their temporary and incidental connection with the *Paul Pry*, and that their acts will enure to the benefit of the whole ship's company. I shall so far admit the explanation offered of the capture, as to examine what rights can be communicated to the ship by a capture made by a boat's crew so detached. It has been pointed out in the argument that all the clauses of the instructions annexed to the treaty, seem to imply that the capture should be made under the personal direction and responsibility of the captain or commander of the ship of war. He may send a lieutenant to search and examine a suspected ship, and that clause furnishes some inference as to the use of boats contemplated in the treaty: but the commander is to certify the papers, and do other acts which are required as a guarantee for the cautious exercise of this new power of seizure given to the ships of another nation.

Here, again, I should be disposed to support the rights of the ship in captures by boats, so far as could be shewn to be reasonable or agreeable to the rules of the service; but the peace of the world is concerned in preserving with accuracy

and precision the lineaments which characterize the public force of independent nations. I cannot extend these relations indefinitely, but must confine myself to such exposition of general terms as may be consistent with the object of the service, and sanctioned by public authority.

In the case of the *Melomane* *, which happened in 1803, on a question of prize of war, the very same relations of a boat belonging to a king's ship, but acting from an asserted tender belonging to the captain of the king's ship, but not authorized by the Admiralty, underwent much discussion; and, in that case, my predecessor being of opinion that the tender was not authorized to take for the benefit of the ship, held the ship's boat, which had been sent on board the tender, to be identified with that vessel, and merged in her character. That might be a sufficient authority to be applied to the very similar circumstances of this case; but I should be sorry to conclude the case on those grounds, if I could find any authority in reason or in any recognized usage of the navy for the proposition now advanced, — that a capture like the present, made by an open boat, at the distance of 1500 miles from the ship, and without any reference to the discretion or judgment of the commander of the ship, could be deemed a description of service comprized in the clause of the proclamation which I have read. Neither reason nor usage, so far as I am informed, will justify such an interpretation; and I have used the best means of obtaining authentic information on the subject. The records of this Court do not furnish any in-

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* 5 Rob. 41—7.

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stance of such extension: the reasoning of the Court in the *Melomane* was against it. I think the detachment of boats and officers, mentioned in the proclamation, must be understood with some limitation; and I can suggest no other than such a practical dependence on the orders of the commander, to be executed within the sphere of his personal superintendence and direction, as will substantially connect him with the responsibility attached to the capture.

It is asserted in the act on petition that the clause respecting detached boats was introduced into the late proclamation with reference to this class of cases; but that is not correct, since it was inserted first in the proclamation of 1816, relating to revenue seizures, and has been since continued.* It is said, also, that in the *Nicanor*, and the *Principe de Guinée*, bounties were granted for slaves captured by the tender of the *Maidstone*, lying at *Sierra Leone*, at a distance of eight or nine hundred miles from the ship; and, in one case, I believe, by boats from the tender. In the *Fabiana* there were no slaves on board; and no bounties had been paid. In the *Nicanor* and *Principe de Guinée*, there was a special reference to the Admiralty, which recognized the use of that tender; and it must be presumed to have been properly authorized. Those cases, moreover, were not referred to this Court; and, therefore, whatever may have been done in them, if contrary to the letter or spirit of the law, will not justify me in exercising such a discretion.

It is said, also, that no instructions under the

* See the Proclamations of 1824, 1825, and 1827.

treaty have been furnished to any tender but the *Black Joke*. The instructions under the treaty seem to be confounded in the act on petition, perhaps by both parties, with the orders or permission of the Admiralty to employ tenders: such employment is authorized, as I am informed, by official letters sanctioning the purchase or use of such vessels; and it is granted only for a limited number of such vessels, with reference to the service on which the ship is employed, the number of her crew, and other considerations of a public nature, by which the fitness and expediency of such a measure must depend. No such permission is alleged in support of this claim; and I am bound to pronounce that, taking the facts of this capture in any way in which they can be represented, either as a capture by the *Paul Pry*, or by the boat of the *Sybille*, it will not entitle the *Sybille* to the bounties claimed under the act of parliament.

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COGNAC. EWEN.

February 15th,
1832.

THIS question arose on a bottomry bond. In December 1830, the *Cognac*, with a cargo of brandy, clover, and coriander seed, having sustained considerable damage in her voyage from *Charente* to *London*, put into the port of *La Flotte*, in the island of *Ré*, to repair. Her cargo was there unladen, the damage repaired, the cargo reladen, and the ship refitted and ready for sea in *March* 1831, when the master, in order to meet

Though the Court of Admiralty has jurisdiction to reduce the premium on bottomry bonds, yet it must act, in the exercise of such power, with great caution, and take into consideration all the circum-

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stances of each particular transaction.

The registrars' and merchants' report, reducing the premium on a bond (given in France for a voyage to London) from 20 to 12½ per cent. over-ruled; but sustained where it disallowed a charge of commission for the unshipping and care of the cargo, at 5 per cent., as unreasonable — though agreeable to the custom of the place; and in lieu thereof substituted an allowance of 5 per cent. on the disbursements: and the Court also sustained the report, where it disallowed a charge for wages advanced to the crew abroad, on the ground that the payment might never have become due.

the expenses, executed a bottomry bond on the ship, her tackle, apparel, furniture, and cargo, for the voyage to London. The bond set forth that “ the master of the *Cognac*, assisted by the *British* vice-consul for the ports of the island of *Ré*, acknowledged the receipt of 24,170 francs 57 cents. advanced to him by Messrs. *L'Hermitte, Marsillacque*, and Co., merchants of *Rochelles*, for defraying the sundry expenses he had been at while at the said port, and so as he had been authorized by judgment from the tribunal of commerce*; he, the master, binding himself to repay to the said lenders the said principal sum at the legal course of exchange at the time of payment, together with a premium of 20 per cent. for and on account of their risks during the said voyage, until twenty-four hours after the arrival of the vessel at

* “ We, the President of the Tribunal of Commerce of the isle of *Ré*, sitting at *St. Martin*, do certify, that by judgment of this tribunal, dated 19th *March* 1831, Captain *Ewen* of the *Cognac* was authorized to borrow on bottomry, for discharging the expenses of his having put into the port of *La Flotte*, the sum of 24,170 francs 57 cents., so as appears from the general account by *M. Dechezeaux*, his consignee.”

“ We further certify, that the custom of this place is to charge 5 per cent. upon the value of the cargo of foreign ships which put into this port.”

* * The *British* vice-consul, after certifying that *Ewen* reported to him the general account of *M. Dechezeaux*, for the repairs of the vessel, the charges for putting into port, and of the cargo, amounting to the above sum; and that he, *Ewen*, had been informed that at *Nantes* and *Bordeaux* the premium on bottomry bonds was 25 per cent. on account of the apprehensions of war; stated, “ that the usual commission in the island of *Ré* upon sea averages was 5 per cent. upon the value of the cargo of foreign ships.”

London, the whole at the charge of the lenders." The bond set forth that the master consented to give the premium of 20 per cent. to avoid greater loss to the owners, either by fresh delays or by a sale of part of his cargo. The bond was signed, on the 21st of *March*, by *Ewen*, by the bondholders, and the *British* vice-consul; and attested by two notaries.

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The ship, after a passage of ten days, arrived in the port of *London*; and the bond not being duly paid, an action, on the 14th of *April*, was entered against the ship and cargo in 1400*l.** On the 26th bail was given, so far as related to the cargo, which was then released, and the bottomry bond, with the accounts and vouchers, was referred to the registrar and merchants "to report thereon, and on the premium, and as to the amount due upon the bond." An appearance was afterwards given for the ship-owner; and, on his behalf, on the 9th of *May* the validity of the bond was admitted, subject to the above reference. The ship was sold for 450*l.*, and the amount of freight was 238*l.* 17*s.*

By the registrar's report, the sum of 1265 francs and 55 centimes, paid to the crew on account of wages, was disallowed; also a commission on the value of the cargo; and, in lieu, a commission on the amount of disbursements on the cargo was allowed. These disallowances reduced the amount upon which the premium was to be charged, from 24,170 francs and 57 cents. to 17,110 francs and

* The sum claimed by the bond-holders was 1160*l.* Proceedings against the ship were also instituted by the mariners for their wages, deducting the money advanced to them in *France*.

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57 cents., being a difference of about 280*l.* The bottomry premium was also reduced by the report from 20 to 12½ per cent.

The *King's Advocate* for the bondholder.—The registrar and merchants have reported that several items in the account should be disallowed; but the most essential point is, that the premium guaranteed by this bond should be reduced from 20 to 12½ per cent. In this particular case the precise amount of reduction is not of so much importance as the principle upon which it proceeds. Bottomry bonds are always favourably construed; and I know of no power in this Court to compel a merchant abroad to advance money on bottomry at any stated premium. Where indeed fraud and collusion are imputed, then the premium may fairly be taken into consideration: it may also be a proper exercise of its jurisdiction, and there may possibly be a reasonable ground for its interference, in questions of this nature between *British* subjects, the vessel being at the time in a *British* port; but, where the hypothecation has been in a foreign port, I am not aware of an instance in which the premium on money advanced by a foreigner has been reduced: and the Court itself, at the opening of this case, observed, that “to reduce the premium is a high act of judicial authority.” In the *Zodiac* * consul's fees were charged in a bottomry bond and allowed, the fairness of the transaction not being questioned; and I contend that the equity on the part of the bondholder is much stronger in this case than in the *Zodiac*. The result of that and other decisions is, that a party objecting to a

* 1 Hagg. Adm. Rep. 320.

bond must show some good ground of impeachment. Here I assume that this bond is, in its general features, valid: there is no charge against the master either of fraud or even of imprudence or extravagance; nor is it alleged that the repairs were unnecessary, or that there was any erroneous calculation as to the disbursements. Indeed the accounts were certified abroad to be correct.

Having made these preliminary observations, I will now advert to the several items which have been disallowed, and I will consider them in order. It is said, that wages paid to seamen abroad cannot form an item in a bottomry bond; it, however, appears singular to me, in a case of seamen detained for upwards of three months in a foreign country, that the master should not have the power to take up money, in order to make them an advance, to be allowed to him in account; and this only, because, as is alleged, that the mariners' contract is not to be enforced till the end of the voyage. Are the men in the meantime, and for an unexpectedly protracted voyage, and during a severe period of the year, to be left perfectly destitute? The master, in this case, had no funds, no personal credit, and yet is he not to have the power to charge the ship with that which is a primary lien upon it, and for which it is responsible in priority to all other claims? And here the advances were sanctioned by the Tribunal of Commerce. But, however this may be, the bondholder is not bound to look to all the disbursements. If this Court were to disallow these advances, it would be an interference with the decision of a foreign tribunal; and the payment having been made under the direction and sanction of the Court where the

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vessel then was, it obviated the necessity of a sale of cargo, and ought now to be supported.

The next item is the disallowance of the commission charged for the care of the cargo, which was unladen and deposited in warehouses, and for having reshipped it. What has the lender to do with this charge? He is not to look to the disbursements. If, indeed, the merchant who lends the money is also the shipwright and does the repairs, or even superintends them, a suspicion possibly may arise should the commission be excessive; but the matter of commission will depend on the custom at the foreign port: and how can this Court pronounce that such a custom, which is proved to prevail, is vicious, and not to be sustained? What authority can it have to control the usage of a foreign port? That such is the usage is denied, I am aware, in the act on petition; but the certificate of the *British* Consul is directly opposed to such denial. In this case the cargo, at least the clover and coriander seed, would be easily affected by leakage; and when unladen, required particular attention and care to prevent injury by damp: and the charge of commission for this service and the responsibility attendant upon it is disallowed, because the registrar and merchants have thought 5 per cent. on the actual disbursement sufficient.

But the most material feature of the report is the reduction of the premium on the bond. It is said, that an insurance on the voyage home could have been effected at 1 per cent.; but the rate of insurance depends upon the condition of the vessel, which, after her damage, could not be exactly known in this country. However, supposing such

an insurance could have been effected, it has nothing to do with this question; for if it had, on what ground is $12\frac{1}{2}$ per cent. allowed? Where there are a number of transactions 1 per cent. may, on an average, be sufficient to cover the risk, but would not suffice for a single and insulated transaction. Bottomry bonds, however, are to be upheld on general principles, which are peculiarly applicable to them alone. Here is no imputation of fraud; the difficulty of procuring money was great, — there was an apprehension of war; and as much as 25 per cent. was demanded by other merchants: the bond was executed with the sanction of the *British* Consul, and of the Tribunal of Commerce. Can this Court, then, determine that the bondholders ought to have advanced their money at a lower rate of interest? How is it to adjudicate safely upon such a matter? If bonds of this nature are to be shaken on minute considerations, it will be greatly detrimental to the interests of commerce; and what impediments will be thrown in the way of obtaining advances on bottomry, if foreign merchants are to be compelled to submit to the views and notions of the registrar of this Court assisted by *British* merchants? On these grounds, I submit that the report cannot be sustained: the accounts have all been allowed, and there is no attempt to impeach the *bonâ fides* of the transaction in any part.

Addams, for the owners of the cargo, observed, that the accounts could not be impugned, because the master had absconded; that the *Zodiac* was inapplicable, the vessel, in this case, being within an easy communication of this country.

Dodson for the owner of the ship.

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Sir *Christopher Robinson*. — This is a question relating to the reduction of the premium of a bottomry bond, under the following circumstances: The ship, belonging to persons in the north of *England*, was chartered to go to *Charente*, in *France*, and bring a cargo of brandy to *London*. The brandy was laden, and the ship sailed on the 25th of *December* 1890, and met with bad weather in the *Charente* river. The storm continued when she got out to sea, and she became leaky, and was obliged to put into the *Isle of Ré*, which is not far from the mouth of that river. The cargo was unladen and warehoused, and the ship surveyed under the superintendence of *M. Dechezeaux*, who had been adopted by the master as the ship's agent. Great repairs were found to be necessary, and were accordingly effected in the months of *January* and *February*. In *March* the cargo was re-shipped. The vessel sailed in the latter end of that month, and arrived in *London* in *April*. In order to discharge the expenses which had been incurred at the *Isle of Ré*, the master took money on bottomry to the amount of 24,000 francs. The expenses amounted to about 18,000 francs, and a sum of 6000 francs was charged as a commission of 5 per cent. on the value of the cargo; making up the total sum of 24,000 francs, for which the bond was given. When the bond was put in suit in this Court, the payment was resisted; and the parties, by a private minute of Court, but without direction from the Court *, agreed to refer

* The Court intimated that it would be convenient, in cases where the legal effect of a bottomry bond was intended to be questioned, that the reference to the registrar and merchants should be made under the Court's directions.

the accounts generally to the registrar and merchants, to report on the premium and the several charges. The report of the registrar and merchants has disallowed a sum of $7\frac{1}{2}$ per cent. on the premium, a sum of 1200 francs paid as two months' wages to the master and crew during their detention, in addition to their subsistence*, and the commission of 5 per cent. charged by the agent on the value of the cargo, allowing a commission of 5 per cent. instead of 3 per cent. on the repairs of the ship, and the other expenses. And an objection to these disallowances being taken on the part of the bondholder, it is for the Court to express what it considers to be the principle of law applicable to the several points.

In the act on petition, the owners rely principally on the report, and allege that it was made on a full hearing of every thing that could be advanced, and that the Court has the power of reducing exorbitant charges, and that the disallowances were properly made. On the other hand, it is alleged that the money was advanced by the lender on a contract perfectly fair, and that the lender is not answerable for the application of the money; that money could not be obtained at a lower premium, owing to the disturbed state of commerce in France, and the scarcity of money, and also on account of apprehensions that were entertained at that time of the breaking out of hostilities between the two countries. In the argument a higher principle has been advanced; and it has been contended that, although there may have been some few instances in which the premium has been reduced, in cases between *British* subjects, this Court

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* The expense of victualling the crew was allowed.

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has no authority to disturb the terms of the agreement between the parties in a case like the present, relating to a contract of this description in a foreign country, on which the foreign merchant has lent his money with perfect good faith; and that the Court has not authority to reduce the premium on a bottomry-bond, unless specifically affected with fraud and collusion, which must be shewn, and proved in a clear and distinct manner. This is almost a denial of the jurisdiction of the Court, which it is proper I should notice *in limine*; and I will take this opportunity of stating what I conceive to be the authorities of law on this subject.

In the *Zodiac*, which has been cited, my Predecessor held that such a power must exist in principle, though it had not been often exercised, and he did not see reason to apply it in the case then under consideration; and I conceive there is no want of authorities for such a practice, when the subject is fully considered. Writers on maritime law treat generally of the contracts of *respondentia* and bottomry under the same head with very little discrimination, as they are similar in their principal character of maritime risk and interest, and are so considered together in countries where contracts of *respondentia* still exist. In this country, that description of bottomry has been disused since the passing of 19 G. 2. c. 37.; and, therefore, we are not so much in the habit of illustrating the one by the other. But if it is considered that *respondentia* bonds are entered into on far more advantageous terms between the contracting parties who know each other, and may be able to judge for themselves of the state of the money-market, and of the risk and profits on which money so employed might be advanced, — whilst in bot-

tomry by the master, like the present, the owner is usually ignorant of all that passes, and the master has no other authority to pledge his property than what is derived from the necessity in which he is placed,— the general principles, on which courts of justice have thought it reasonable to give relief against extortionate bargains in the former class of cases, are as fit to be entertained and applied, in proper cases of this class; and I think I may refer to the principles that have been held distinctly with regard to *respondentia* bonds, as authorities equally just and necessary to be applied to cases of this description.

These contracts have always been considered free from the restraints proceeding from laws against usury*, and have been held to depend chiefly on the agreement of the parties.† But this is not to be understood without limitation; for they are still subject to the restrictions imposed on all contracts by the principles of good faith. *M. Emerigon* ‡ cites, without disappro-

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* See Pothier, vol. iii. p. 85. Also Sir *W. Jones's* observations upon these contracts in the laws of India. *Asiatic Researches*, vol. i. p. 428. See also *Colebrooke's Digest of Hindu Laws on Contracts and Successions*, tit. *Interest*, vol. i. pp. 29. 31.

† Valin (vol. ii. p. 2. liv. 3. tit. 5.), after stating, that the ordinary peace rate of premium on *respondentia* in France, in his time, was from 15 to 20 per cent. on a voyage to the *West Indies* or to *Canada*; from 25 to 35 per cent. to the coast of *Guinea*; and in the coasting trade from 5 to 10 per cent., adds, “ Mais en temps de guerre il est à un taux plus fort, proportionnellement aux risques et aux circonstances; car enfin il n’y a rien de réglé sur cela, et la quotité de profit maritime dépend moins de l’usage courant du lieu, que de la convention des parties.”

‡ Vol. ii. p. 407.

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bation, a passage from an older *Italian* writer, to this effect — “that if the premium is excessive, it may be moderated by the Judge.” In the practice of the Court of Chancery “that Court will not assist the obligee of a bottomry bond when it carries an unreasonable interest:” “the reasonableness or unreasonableness of the interest depends upon the risk.”* In the same manner, the power which this Court exercises in cases like the present does not rest on any direct authority which it assumes over a foreign contract, but on the principle common to all Courts, which restrains them from lending their aid to enforce contracts essentially vicious, or tainted with fraud or extortion. Lord *Hardwicke*, in one case, on contingent or hazardous contracts †, in which reference was made incidentally to the principle of bottomry, discusses at length the effect of fraud and extortion, and assimilates them together: “To take advantage of another man’s necessity is,” he says, “equally bad as taking advantage of his weakness, and in such situation he is as incapable of making a right use of his reason as in the other: and fraud has been constantly presumed or inferred from circumstances and the conditions of the parties; from weakness and necessity on one side, and extortion and avarice on the other; and merely from the intrinsic unconscionableness of the bargain.” When it is admitted, therefore, that fraud or collusion might justify the interference of this Court, we must take those terms with the extension given to them in other courts; and if this Court is re-

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Admiralty, if

* See 1 Eq. Cases, Abr. 372., and cases there cited.

† *Chesterfield v. Jansen*, 1 Atk. 352.

quired to enforce contracts of this kind at all, it must be on such principles as equity demands, and without which neither equity nor justice would be done. We have then, I think, sufficient authority for the exercise of this jurisdiction, on the same principle, in all cases, foreign as well as domestic. Even commercial writers * have noticed the liability of lenders on bottomry to have the terms of their contracts examined in the Courts which are called to adjudicate upon them. It cannot be said, therefore, that there is any surprise on foreign merchants in the application of such principles; and it must be understood, as they do undoubtedly understand, that if they require the aid of this Court to enforce contracts made intentionally to be enforced here, such aid can only be afforded according to the principles which guide its proceedings, and without which it would be an instrument of fraud and rapine, rather than the dispenser of justice.

I have said thus much as to the power and authority of the Court, to prevent any misunderstanding on a point of so much importance; and I now proceed to what is the more immediate question in this case — how far that power ought to be exercised in the several articles that are in issue in this report.

The premium was reduced from 20 per cent. to

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required to enforce bottomry contracts, must proceed on principles of equity.

* *Magens*, in his work on Insurance, (vol. i. p. 400.) mentions the case of a suit in the Court of Admiralty in 1741, on a bottomry bond given in *Carolina*, in which the payment was resisted in respect to certain articles. The case was compromised; but the writer observes, with reference to the expediency, in so terminating the suit, "that the party might have been required to shew that no one else would have advanced the money on bottomry on cheaper terms."

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12½ per cent., on a calculation, as I am informed, that on an allowance of 2½ per cent. for insurance and the expenses of effecting it, 2½ for agency to receive and remit, and 2½ for ordinary interest for six months, there remained a profit of 5 per cent. for the sea-risk; and the surplus was reduced as excessive. I will not take upon myself to say that this calculation might not be, under some circumstances, reasonable and liberal; but I am to examine the contract as it stands, with reference to a particular time, and to the special circumstances under which it was formed. It is described as a high premium in the bond; and the reason assigned in the correspondence is, that money could not be obtained at a lower premium, owing to its scarcity in *France*, and the disturbed state of the country, and the apprehension of hostilities between the two countries. On a reference to the public journals of that time, I find that representation to be confirmed by the daily news, and by the state of the funds both of this country and of *France*. If such a cause really existed, it is reasonable to suppose it might operate on the minds of the parties; and I cannot go the length of saying that the fairness of the transaction may not very materially depend on that consideration.

The act on petition alleged that communications had been made to the owners in *London*, or their agents, of all that was passing in *France*, and that correspondence has since been brought in. It appears from it that *M. Dechezeaux* duly informed the owners on the 29th of *December* of the accident, and in *January* and *February* repeatedly urged on them the expediency of providing funds in *London*, advising them of the sums required, and of the impossibility of obtaining money in

France at a less premium than 20 per cent. The owners here took no measures, till in the month of *March* instructions were given to a house at *Rochelle* to procure funds; and the answer to that letter of the 16th of *March*, advises them that the money had been taken on bottomry at 16 per cent. This appears now to have been incorrect; but the observation which I found upon it is, that it seems to have excited no remark as to the exorbitant rate of such interest, though much higher than the rate allowed in the report. Surely these facts tend strongly to exonerate the agent and the lender from any imputation of clandestine collusion. They likewise supply the best proof which the Court can have of the fairness of their conduct, and perhaps they go further, and furnish some test of the state of the money-market both in *England* and *France*; for although it might be difficult for the different owners and insurers to adjust their several shares in the funds required, in the way of immediate contribution, it should be remembered that money might have been raised on bottomry in *London* as well as in *France*; and if it was not so raised at a lower interest, it may be inferred that the terms of this bond were justified by the circumstances of the times. In such a case, how can I say that the bond is affected with fraud or collusion, or with the vice of extortion? Though I might have expected that money might have been advanced at a lower rate, and particularly when I see that in the *Gratitudine* *, in time of open war, the premium between *Lisbon* and this country was only 16 per cent. — yet I cannot act on that supposition, to

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* 3 Rob. 240.

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the effect of saying that the premium actually stipulated for in this case was excessive, so as to authorise this Court to reduce the rate, which would only exercise such an authority on clear and indisputable grounds. Considering the caution with which it behoves the Court to act in such questions, I cannot venture to form any such conclusion. I therefore over-rule the report of the registrar and merchants on this point.

In respect to the commission of 5 per cent. on the value of the cargo, I shall not enter into the alleged custom of *France* on this point. Such a custom of a particular country would have very little effect against foreigners, unless it is reasonable and just. To sanction a charge of 5 per cent. on a whole cargo, of whatever bulk or value, for such services as these, cannot, I think, be deemed reasonable or just. It is, indeed, a reflection of the intelligent writer to whom I have before alluded *, “ that all customs of merchants are not founded on right principles, and, though become respectable by antiquity, that they should not avail in any suit of law, so as to outweigh the scale of right reason.” This commission is manifestly a very high charge, not limited to the necessities of the case, and on that ground it is not capable of being sanctioned and allowed by this Court. In the *Gratitude* the commission of 5 per cent. was charged only on the advances. Whatever, then, may be the reliance of foreigners on their own customs, they can only obtain by the aid of this Court such relief as is compatible with the principles of law administered here. On this point, the registrar and merchants have acted in conformity to the principles which

* See *Magens's* Preface, pp. 4, 5.

have always guided the decisions of this Court, and I confirm that part of their report. I confirm also the disallowance of wages, paid before the termination of the voyage, and in addition to the subsistence allowed during the detention, on the ground that it was a premature payment that might never become due; and if paid in this form, might fall, as it has done, on the owners of the cargo, who are not properly liable to it.

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The Court directed the report to be reformed, by allowing the original premium of 20 per cent., and in all other respects confirmed the report.

The Court pronounced for the modified amount of the bond, with interest at 4 per cent. from the time it became payable to the date of the decree, and with costs.

On the 19th of *February* the amended report, certifying that 821*l.* 6*s.* 4*d.* was due to the bondholders, was brought in. An appeal was asserted, on the part of the bondholders; but, on the 28th of *May*, it being alleged that the appeal would not be prosecuted, the amended report was confirmed.

Addams then prayed that the consignees of the cargo be dismissed on payment of the balance of the report.

The *King's Advocate*, *contra*, applied for interest and costs.

An act on petition was afterwards entered into in support of these respective prayers; and on the 6th of *July* the Court, agreeably to the petition on the part of the bondholder, pronounced interest at the rate of 4 per cent. to be due on the amount of the bond, from the time the same became payable, to the 15th of *February*, being the date of its decree, and with costs.

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PRINCE FREDERICK. HART.

Ship's articles are only conclusive as to the amount of wages and the voyage: on collateral points the Court of Admiralty may consider how far they are reasonable and just; therefore a clause, providing that if contraband goods were found in the fore-castle, the seamen living therein should forfeit their wages and 10*l.*, is not conclusive to work a forfeiture of wages against those not directly proved to be personally implicated in the offence. The penalty cannot be enforced in the Court of Admiralty.

THIS was a suit for seaman's wages on a voyage from *London* to *Rotterdam* and back. The owner gave in a defensive plea*, alleging, that on the day after the arrival of the ship in the port of *London*, a custom-house officer found, and seized as contraband, in the fore-castle, being that part of the ship appropriated to *Powell* (and three other seamen by name), 22 lbs. of tobacco, which belonged to the said four seamen; that *Powell* had declared to one *Turner*, with whom he lodged, that he had taken one lot of contraband goods

* The ship's articles were annexed. After the usual clauses, was a clause, in print, which contained the following extracts:—
“And we the undersigned seamen and mariners do further severally agree, that, in case of any *smuggling* or *illicit transactions* on board, in which any one or more of us shall or may in any manner whatsoever be concerned, or which shall take place by or through the culpable negligence or wilful misconduct, or want of reasonable care on the part of any of us respectively, we shall and will be content to forfeit all such wages as may be due to us respectively, and a further sum of 10*l.* by each and every one of us to the owners.”—“And further we, the seamen living in the fore-castle, do hereby agree, and are content to be subject to the like forfeitures in the event of any CONTRABAND or PROHIBITED GOODS being found in the fore-castle by the officers of the customs in *England*, beyond the quantity allowed as sea-stock.”—Then followed a clause, in writing, as follows:—“In the event of any contraband or prohibited goods being found on board the said vessel by any revenue officers beyond the quantity allowed by law as sea-stock, we shall and will be content to forfeit all such wages as may be due to us respectively, and a further sum of 10*l.* by each and every one of us to be paid to the owners.”

away from the ship, and that there were twenty-five more parcels: that in consequence of such contraband being so found, *Powell* and the remainder of the crew had forfeited all the wages to which they would otherwise have been entitled.

Addams, for the mariner, opposed the allegation. The *King's Advocate*, contra.

JUDGMENT.

Sir *Christopher Robinson*. — This is a case of wages, on the suit of *Adam Powell*, (but affecting others, as it seems now proposed to fix the principle, involved in this allegation, upon others of the crew,) in which the owners have pleaded a cause of forfeiture on the ground of smuggling, and it is so pleaded as a fact provable against *Powell*. There is no objection to an allegation of such a fact on the general principles of maritime law; but the allegation goes on to plead the ship's articles, and two particular clauses of that instrument, which stipulate that the wages of the seamen shall be forfeited on the mere finding of prohibited goods in the ship, and more especially in the fore-castle, which is appropriated to the use of the sailors, and where, it is alleged, such articles could not be stowed away, without the knowledge and privity of all individuals having access to that part of the ship. This may properly affect *Powell* in conjunction with the pleading of the fact; and as to him it is not denied that the allegation is admissible. But, as to the three other seamen, it is only pleaded, "that in consequence of the contraband goods being found in the fore-castle, *Powell*, as also the remainder of the crew, have forfeited all their wages."

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The opinion of the Court is requested on the effect of the special clauses as to such a forfeiture, in the ship's articles, in order to save the expense of further proceedings; and I am clearly of opinion that I could not pronounce for a forfeiture of wages on such clauses alone, unsupported by any proof of the fact against the individuals. I will explain the grounds of this opinion, which is founded, I conceive, on the intrinsic injustice of the principle contended for on the part of the owners, as well as on the act of parliament, and the authority of adjudged cases.

With respect to the first point, it is sufficient to say that it is not impossible, however little to be suspected, that prohibited articles might be secreted there without the sailors' knowledge, by the master himself or his officers; and the bare possibility of such a fact would prevent the Court from drawing any conclusive inference against any individual from the force of the articles alone. As to these incidental additions to the ship's articles, it is to be recollected, that this instrument is required by the 2 G. 2. c. 36. for the protection of the owners, on the specification of the wages, and of the voyage, with respect to which the articles are conclusive: but on other collateral agreements it has been decided by my predecessor, in the case of the *Minerva**, that they are not in all cases conclusive; but that this Court may, as a Court of Equity, consider how far such clauses are reasonable and consistent with justice, bearing in mind the general ignorance and imprudence of seamen, and their inability to understand the meaning of a

* 1 Hagg. Adm. Rep. 347.

long and multifarious instrument, as the ship's articles are made by these additions. This principle has been adopted by Lord *Tenterden*, without dissent, in his *Treatise on Shipping* *; and the concurrent opinion of two such persons justifies me in holding that this clause, *ex vi termini* alone, is not obligatory and binding on the Court. On precedent also,—in the case of *Thompson v. Collins* †, which has been cited by the King's Advocate, the Court of Common Pleas had occasion to consider the effect of an embezzlement not proved against any individual; and the Court was there of opinion that such a principle could not be pressed to the forfeiture of wages from a mere clause in the articles making that fact a cause of forfeiture, without proof of the fact against the individuals: and although the Court, in intimating this opinion, permitted the question to be argued more fully, if the counsel should desire it, the party acquiesced, and the point was not again brought forward. In that case the principle contended for might be less inequitable even than the present; because there are traces in ancient ordinances of rules by which a loss of freight, occasioned by loss of goods, was held to affect the seamen by a proportionate deduction of wages. ‡ But here no loss is alleged to have been sustained by the owners, and I presume the ship would not be affected by such an act, without proof or presumptive inference against the owners or master; at least such was the ancient principle, for the 38 *Edw. 3. c. 8.* enacts, “ that

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* 5th ed. p. 435.

† 1 Bos. & Pull. N. R. 347.

‡ For a claim of deduction from wages on account of damage to goods by negligence, see the *New Phanix*, p. 420.

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an owner shall not lose his ship for a small thing put within the ship not customed, without his knowledge." It would, therefore, be inequitable to act on a different principle against the mariners.

It is to be observed, also, that the same clause in the articles imposes a penalty of 10*l.* on each seaman in addition to the forfeiture of wages: this penalty could not be enforced in this Court; and it suggests to the Court the duty of not putting such a penal construction on the operation of the condition respecting wages, when the owner may, if he is so advised, enforce the whole clause against the seamen by the authority of a court of common law. I shall therefore not hold the articles alone conclusive to work a forfeiture of wages against any individual, who is not alleged and proved to have been personally implicated in the offence. The allegation must be reformed, therefore, so far as it implicates any seaman except *Powell*.

Note. The owner paid the wages and costs.

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PUBLIC OPINION. ACKLAND.

In a cause of collision happening in the *Humber*, twenty miles from the main sea, but within the flux and reflux of the tide, and at about three fourths flood, the protest of

THIS was a cause of damage by collision in the river *Humber*, brought by the owners of the *Royal Charter* mail packet against the *Public Opinion*, a passage boat. An appearance was given for the *Public Opinion*, under protest, on the ground that "the site of the collision was within thirty yards of the west pier, at the entrance of the *Humber* dock basin, in the parish of the *Holy*

Trinity, in the south ward of *Myton*, in the town and county of *Kingston-upon-Hull*, twenty miles up the river *Humber*; and that therefore the collision did not take place on the high seas, but within the body of a county." It was alleged, on the other hand, "that the site of the collision was about thirty yards from the outer end of the western pier of the port of *Hull*, within the flux and reflux of the tide, which was, at the time of the collision, about three-fourths flood, and within the Admiralty jurisdiction."

The treasurer of *Hull* stated, from his knowledge as chief clerk to the guardians of the poor, that "beyond the line of the low water mark the *Humber* was considered as a branch or arm of the high sea, and not within the town of *Hull*, and, consequently, not capable of conferring a settlement."

The affidavit of a sheriff's officer stated, "that he was in the habit of executing warrants upon civil processes, and making arrests in civil actions upon such part of the *Humber* as he considered to be within the jurisdiction of the sheriff of *Hull*; and that he had always understood such jurisdiction to extend from the fore-shore of the river within and adjoining to the town to the middle stream of the river; but that, in 1828, it was intimated to him by the magistrates, that he could not arrest beyond low water mark."

The master of the *Royal Charter* stated, that "the *Royal Charter* was first struck at the distance of about thirty or forty feet from the west pier, and beyond the line of ordinary low water mark of the *Humber*; that the place, where the *Royal Charter* was at the time she was forced against the

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the defendants
sustained upon
proof that the
site was *infra*
corpus commu-
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west pier, is usually covered with water at low water; but that at spring tides the water recedes from the shore to the distance of about ten or fifteen feet, leaving the mud in front of the west pier.”

It appeared, from a pilot's affidavit, that the width of the *Humber* between *Hull* and the opposite coast, was about three miles, and that a person on the shore at *Hull* could not distinguish what was doing on the opposite shore; that the river was navigable beyond *Hull*, not only for merchant vessels, but for men of war; that there was no bridge across the *Humber*, but that it was navigable throughout, extending from the sea westward to the junction of the *Ouse* and *Trent*, being about forty-two miles; the town of *Hull* being half way; that the first bridge on the *Ouse* was at *Selby*, and on the *Trent* at *Gainsborough*.*

* An inquisition, and also a charter to the town of *Hull*, (from the tower records,) contained the following extracts.

“ It was found by the inquisitors upon oath, that *Richard Earl of Arundel*, and *Alianor* his wife, have and hold a certain passage over the water *Humber*, at *Barton-upon-Humber*, with the profit of the same passage, as in dower of the same *Alianor*, the reversion of the same passage belonging to *John*, son and heir of *Henry de Beaumont*, within age, and in the custody of the lord the king; and that they say, that they and all other lords of the town of *Barton*, from time whereof the memory of man is not to the contrary, have had and were accustomed to have that passage and the profit of the same, and that no other hath been accustomed to have any passage over the water aforesaid within the limits of *Redeclif* and *Twygrayn* before these times; save that at *Barrow* haven, within the limits aforesaid, there is and for all time was a certain easement for the tenants and men of the town of *Barrou*, for themselves, their goods, and merchandizes over the water of *Humber*, to be taken from thence at their will, at their own costs to be

Extract from
an inquisition
taken in the
44 Edw. 3. to
ascertain the
right of passage
over the
Humber from
Barton.

Addams, in support of the protest, contended that the damage was done *infra corpus comitatus*.

The *King's Advocate*, contra,—That the *Humber* was described as “an arm of the sea;” and that the Admiralty jurisdiction was consequently not excluded. He referred to the case of the *Pearl*.*

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JUDGMENT.

Sir *Christopher Robinson*.—The Court is called upon to decide against its own jurisdiction; and although that is not a very pleasant duty, it must be discharged with fidelity and candour according to the rules of law which are applicable to the subject. The Court must do this on public grounds, and also with reference to the interests of parties, who may be affected by the distinction. It appears incidentally that the owners of the *Public Opinion* are become bankrupt; which may be the reason for proceeding here against the vessel, and may involve a question of interest, as

carried, and thither to be brought without any toll or custom to be paid to the lords of *Barton*.”

“Desiring the bettering of the said borough, which is situate upon the *water of Humber*, which is an *arm of the sea*, and which is now enclosed, and considering, from the good, and secure keeping of the same borough, the defence and safety of our people of parts adjacent against the attacks of foreigners on the sea, coasts and elsewhere may many ways happen; and also that the burgesses may more quietly attend to their affairs, and the business of us and of our heirs be more properly effected in time to come: and, moreover, of our more abundant favour we have granted, as much as in us is, to the mayor, bailiffs, and burgesses of the said town of *Kingston-upon-Hull*, and to their heirs and successors, that they shall have a port for ever annexed to the said town and liberty thereof, from *Sculcote Gate* unto the *middle course of the water of Humber*.”

Extract from a charter of 9 Hen. 6. reciting, among other charters, a charter of Edw. 1. and confirming the privileges of the burgesses of *Kingston-upon-Hull*.

* 5 Robinson, 224.

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to the priority and preference of these parties, against the ship, over the general creditors.

Since the statutes of *Ric. 2.** and of *Hen. 4.*† it has been strictly held, that the Court of Admiralty cannot exercise jurisdiction, in civil cases, on causes of action arising *infra corpus comitatus*; and in a very recent case the Court of King's Bench has issued a prohibition in a case of collision, in which the *Lord of the Isles*, a steam boat, was charged with damage to a merchantman in the *Solent Sea*, running between the *Isle of Wight* and the *Hampshire* coast. That place is, then, nearer to the main sea, and has more the appearance and general character of sea than the present *Hull* is twenty miles from the sea, and invested with a special local jurisdiction, which reaches beyond the spot where this injury is alleged to have been done. It is the seat of numerous mercantile contracts and transactions, some of which might perhaps be brought within the verge of this Court, if its jurisdiction should be established in this case: the wages of seamen or boatmen in the passage navigation might be of that kind; and many consequences might follow, which might interfere with the course and habits of trade as they have hitherto prevailed.

The general characteristics of inland waters belong strongly to the place of action. It is twenty miles from the main sea, very near to the land of *Yorkshire*, and not above three miles from the *Lincolnshire* coast; and, therefore, not beyond the reach of sight and the ordinary cognisance of juries. No case has been found to support such

* 13 Ric. 2. c. 5. 15 Ric. 2. c. 3.

† 2 Hen. 4. c. 11.

proceedings; and, I think, I can venture to say, none has occurred within a pretty long experience, which I have had in the practice of this Court. The case which has been mentioned related to the termination of a sea voyage, and in no manner affects this question. The documents which have been exhibited shew that this part of the river is within the recognised territory of the county; and, as such, subject to the process of the courts of common law. I feel, therefore, that it is my duty not to adventure beyond the known limits of my authority; and I should only involve the parties in expense and disappointment, were I to encourage any such experiment. I therefore dismiss the suit; but I do not think it a case for costs.

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OPINION.

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THE AMPHITRITE. MORGAN.

May 2d,
1832.

THIS was a case of mariner's wages. The seaman, *Forsyth*, was hired on a voyage from *London* to *Rio Janeiro* and back. In his summary petition he alleged, that, at *Rio*, on the 19th of *September*, he quitted the *Amphitrite* for the purpose of entering into the service of *H. M. S. Beagle*, Captain *Fitzroy*, which he accordingly did on that day, and was thereupon rated in the ship's books as an able seaman from that day. The evidence consisted of the answers of *Morgan* (the late master of the *Amphitrite*) on the summary petition, and of extracts from the log, annexed to his affidavit.

A mariner quitted a vessel in defiance of the master, with opprobrious language; and, without any declaration of such intention when he quitted the vessel, entered on board a king's ship within twenty-four hours, — this is desertion, working a forfeiture of wages.

The answers stated, that it was not on the 19th

AMBITATE.

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1832.

(as pleaded inaccurately) but on the morning of the 25th that *Forsyth* deserted.

Addams, for the mariner.

The *King's Advocate*, contra.

JUDGMENT.

Sir *Christopher Robinson*. — I have some reason to regret that this case has been brought on without any statement of the facts put in issue in the form of an allegation: it rests entirely on the answers of the master, and on the entries in the log, which are scarcely intelligible without a specification of the particular entries relied on, and without some intimation of the points to which they are intended to be applied. And it is with difficulty that I have been able to collect what is the real question between the parties. It now appears to depend, chiefly, on the entry of the 25th of *September*, which imputes to the man a wilful and contumacious refusal of duty, and a quitting of the ship not only without leave, but in defiance of all authority. The vessel arrived at *Rio* on the 19th; disagreements there arose; and there are entries in the log of a refusal to work on the 23d and 24th, which was highly reprehensible, and of the man's dissatisfaction with the ship's provision, which was made a formal complaint to the commander of *H. M. S. Adventure*, then at *Rio*, and was reported, upon inspection by his officers, to be groundless. If the bread had not been good, it would not have justified such behaviour, as it was his duty, as a seaman, to work as long as he remained on board the ship. It is said, however, that he had returned to his duty on the 24th, and was permitted to work, which implied a for-

giveness of his former disobedience. That would be an indulgent interpretation of his behaviour; but it is unnecessary to consider strictly the effect of it, as the following entry on the 25th describes a much more violent and contumacious act of disobedience, on quitting the vessel in defiance of the master, and with these opprobrious expressions:—
 “There, d—n you; we have now done you.”
 These words import malice and resentment, and imply that he thought he had done some injury to the master. Could any thing be more inconsistent with the duty of obedience and faithful service than such conduct? It is not pretended that he ever returned to his duty, or that there was any reconciliation or remission of this behaviour.

But it is said that the mariner entered on board *H. M. S. Beagle* within twenty-four hours after leaving the merchant vessel, and that such entry will bring him within the protection of the 2 G. 3. c. 36. s. 13., which provides, “that entry on board a king’s ship shall not be deemed a forfeiture of wages.” In order to bring the case within the benefit of this clause, it is contended that a *bond fide* leaving the ship with the intention of entering was equivalent to entry, and that the articles of the merchant vessel stipulated, in effect, that mere absence for less than twenty-four hours should not be deemed desertion. Such a clause, I conceive, relates to occasional absences, which are frequent in the carelessness, idleness, and intemperance in which sailors indulge in port; but it cannot be extended to such a wilful denial of authority and refusal of duty, as is described in this entry of the log; and as to the claim of twenty-four hours, to take off the consequences of such wilful insubordination, by a

AFFIDAVIT.

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A clause in the articles, to the effect that mere absence for less than twenty-four hours shall not be deemed a desertion, relates to occasional absences, and not to a wilful denial of authority.

AMERICA.

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subsequent entry on board a king's ship, it is quite inconsistent with any reasonable construction of such a privilege. I could assent to the proposition, that a *boná fide* declaration of an intention to enter might be considered as entry for some purposes, as if a mariner was prevented from entering by the act of his master; but the *bona fides* is the main part of that proposition which cannot be applied to such conduct as this. It cannot be imagined, that any privilege conferred upon a man for entering into the king's service should be intended to encourage him to defy his master, and commit all possible acts of disobedience under the cover of a subsequent entry. Such conduct is not a *boná fide* entering into another service, which ought to be made without prejudice to his duty and service to his former master. To suppose that a man should have twenty-four hours to put a colour on such misconduct, by which the vessel might even be lost in the mean time, is quite inconsistent with the obligation of faithful service contracted to his former ship; and I cannot accede to such a proposition. In what was done the next day, when the lieutenant of the *Beagle* went for this man's clothes, and returned without them, that officer seems to have acquiesced in some degree in the construction put on the act of desertion by the master, who at least appears to have acted consistently from the first in his opinion of the man's misconduct. Looking to the effect of the acts now proved to have been committed, and not afterwards discharged by subsequent reconciliation and forgiveness, I think the mariner is not entitled to wages for a service so terminated by his own misconduct; and I dismiss the suit.

TWO PIRATICAL GUN BOATS.

July 6th,
1832.

THIS was a question relative to the distribution of bounties on the capture of pirate vessels, — whether the bounties enured to the whole ship's company, or only to the actual captors?

The *King's Advocate* and *Dodson* for Capt. *Pellow*, and the officers and men of the *Revolutionnaire*.

Phillimore and *Addams* for the actual captors.

Bounties for the capture of pirates, made by boats detached from a king's ship, at a distance of some miles from the ship, but not out of signal distance, are distributable among the whole ship's company.

JUDGMENT.

Sir *Christopher Robinson*.—This is a question respecting the distribution of bounty-money given by act of parliament for the destruction of pirates; and it is simply this, whether, the capture being effected by two boats' companies detached from the *Revolutionnaire*, the bounty belongs to those individuals exclusively, or to the whole ship's company? The ship was at anchor in the port of *Zante* on the 18th of *May* 1821, when intelligence was received that two piratical gun-boats were committing acts of depredation on the opposite shore, near the entrance of the *Gulf of Patras*, and had actually plundered and ill-treated two fishing-boats belonging to *Zante*. Two barges, manned with forty-three men from the *Revolutionnaire*, and victualled for three days, were despatched in pursuit of them: they were so despatched at sunset of the 18th, and on the following morning they rejoined the ship, having completed the service on which they were sent.

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and taken and destroyed the piratical boats, after a severe contest and very gallant attack,— at a distance of ten or fifteen miles from the ship*, but not apparently out of sight or signal distance, except owing to the intervention of a headland. The boats were condemned in this Court, in 1829, to the *Revolutionnaire* generally, on affidavits, principally of Lieutenant *Morell*, setting forth the facts of the capture and the number of the pirates, as they are now pleaded; and no question was suggested to the Court, disputing the right of the *Revolutionnaire* to share in the whole interest, though it is said it was always intended to try the question as to the bounties.

The right of the *Revolutionnaire* to share in the capture of the hulls is conceded; but it is said that the Order in Council of the 30th of *September* 1825, has raised a distinction as to the bounty given by the act, and appropriates that exclusively to the persons who were actually present at the attack, and composed the boats' crews detached on that service. With this single exception, the general principle of the navy is strongly recognised of holding a strict unity and identity between the several classes of seamen composing a ship's company; and no instance has been shown in modern practice, in which any severance has been made between them, even in head-money or bounty, with reference to any special facts of particular cap-

* For the crews of the barges, the distance was alleged to have been fifteen miles, and that, "as well from the distance, as from their having rounded a point of land, the barges and the piratical boats were wholly out of sight of the ship." On the other side it was alleged, "that the distance was only eight, or, at most, ten miles."

tures. The advantages of such a principle may be inferred from its long adoption, if they were not obvious, in many views, to common observation. The public force is best economized by such an arrangement; and detachments are made adequate to the object to be attained; it preserves general subordination and general harmony between the crew; whereas a contrary system, encouraging individuals to catch at separate interests, according to shades and degrees of service, would not fail to raise distinctions of jealousy and preference, and to introduce constant litigation between individuals. On the present system, it may be further observed, may be ingrafted, and is ingrafted, the opportunity of superadding personal and individual advancement, on account of special services; and the gallantry of the present action has been so attended with promotion to the chief officer, and perhaps by other subordinate appointments.

The general principle of distribution of bounty or head-money in the prize acts* has been to give it to the officers and seamen actually on board a king's ship or privateer at the actual taking. The pirate act† also declares the bounty to be meant as an

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* See 45 G. 3. c. 72. ss. 5, 6., 55 G. 3. c. 160. s. 6.

† The 6 G. 4. c. 49. (passed on 22d of June 1825), entitled "An Act for encouraging the Capture or Destruction of piratical Ships and Vessels," recites, "Whereas it is expedient to give encouragement to the commanders, officers, and crews of H. M. ships of war and hired armed ships to attack and destroy any ships, vessels, or boats manned by pirates," be it enacted, that there be paid "unto the officers, seamen, marines, soldiers, and others, who shall have been actually on board any of H. M. ships or vessels of war, or hired armed ships, at the actual taking, sinking, burning, or otherwise destroying of any

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encouragement to the *commanders, officers, and crews of H. M.'s ships*, and gives the bounty to the *officers and seamen actually on board at the actual taking and destroying*; and it further provides that such bounty shall be distributed to and amongst such persons, and in such manner, form, and proportion as his Majesty by any Order in Council shall direct.

The persons, therefore, to whom the bounty is given are specified by this statute, and are the same as those partaking in the distribution of head-money; and it may be doubted whether the Order in Council could, if it so intended, entirely strip any classes of persons, so specially described in the act of parliament, of all interest in the grant. The only authority to the contrary is alleged to be contained in the concluding sentence of the Order, which directs the proceeds of a pirate ship, and the bounty, to be distributed according to a former order of the 23d of June, 1824, "save and except that no flag-officer or other person, not actually present at the capture or destruction of the pirate vessel, shall be entitled to share in the distribution of bounty, in respect of the crews of such pirate ships, vessels, or boats;" and adds that, "in all cases where any flag-officer or flag-officers shall be so actually present, the captain shall take only two eighths, and the flag-officer or flag-officers one eighth." There is, in this Order, an entire omission of any supposition of captures by boats, in

ship, vessel, or boat manned by pirates, since 1st of January 1820, 20%. for every pirate taken and secured or killed during the attack, and 5%. for every man of the crew not taken or killed, who shall have been alive on board the pirate ship at the beginning of the attack."

creeks or shoals, or at any distance from the ship, as frequently happens, in consequence of local difficulties, and no provision is made for distribution of the three eighths to any person but the Captain and Flag-Officer. In all former practice, those actually on board the King's ship at the taking were considered as present. The exceptive clause says, perhaps, no more than that no flag-officer or other person not actually present, that is, not on board the ship, shall share; whilst those who were considered as actually present before, may be still so considered according to the rules of the service, and so come within the meaning of these terms. I feel a difficulty, also, in saying that the exclusive terms "*No flag-officer or other person,*" adequately describe the Captain, and other component parts of the ship's company. To exclude them, who had always been admitted before, seems to require that more distinct and appropriate terms should have been used. Looking to these considerations, I am inclined to adhere to the interpretation which agrees with all general analogy and former practice; and I feel fortified in such construction, by seeing, as I have before observed, that the words of the act of parliament give this bounty to the officers, and seamen, and others, who shall have been actually on board his Majesty's ships at the taking or destroying of any pirate boat; and, I think, I ought to presume that the Order in Council, in regulating the distribution, meant to preserve those interests.

Interest of the whole ship's crew established,

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THREE SLAVES.

Slaves, recently but not legally transferred from a son to his mother, removed from *Watling's Island* to *New Providence*, both places being under the same government, a licence from the governor for their removal as plantation slaves under 5 G. 4. c. 118. s. 14. having been refused, and without certificate of registration, and afterwards claimed by the mother as domestic slaves attending upon the son as part of her family, condemned.

THIS was an appeal from the Vice-Admiralty Court of the *Bahamas*, upon an information under the 5 G. 4. c. 118., the Slave Abolition Act, for an illegal removal of two female slaves, and a male infant, from *Watling's Island* to *New Providence*, without licence from the governor, and without a certificate of registration. The seizure took place in *June* 1831; and the question turned upon the fourteenth, seventeenth, and forty-second sections of the statute. The Court having decreed restitution of the slaves, but that "there was probable cause of seizure," this appeal was prosecuted by the Crown.

The *King's Advocate* in support of the appeal.
Phillimore contra.

JUDGMENT.

Sir *Christopher Robinson*. — This is a perplexing case for a court of appeal, as it grows out of an obscure transaction between a busy blundering woman, as her solicitor describes her, and her son, who was also described in the court below as a person, though not quite an idiot, labouring under great imbecility of mind; and I presume these considerations have been felt, in some degree, on the part of the prosecution, as the proceedings are not for penalties, but only for the condemnation of the slaves, who have been liberated according to the provisions of the act on an appeal. The effect of this appeal, therefore, is only to determine whether the party is entitled to compensation, or on whom

the loss so occasioned must fall. The proceedings in the court below failed to support the special grounds of the information, in the opinion of the learned and experienced Judge who tried the cause, and it is only by a close and critical examination of the acts and designs of the parties, as established in evidence on the several counts of the information, that I can find any ground for coming to a different conclusion. Judging from the information alone, and the sentence, I might almost doubt whether the legality of the transaction, independent of the intention to sell, which is negatived, and the intrinsic character of the slaves, was intended to be put in issue. But, taking the last count of the information, together with the principles asserted in the claim, I believe the case may be considered as raised in all the views that I think properly belong to it.

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It appears that a gift or transfer of two slaves from the son to his mother, was projected in the month of *May*, and a form of instrument prepared, which, however, was not executed; and as slaves, it is said, can only pass by writing, it does not appear, as the Judge below observes, that this woman can strictly be considered as entitled to claim. However that may be, in concurrence with the projected transfer, the mother and son presented a petition to the Governor, praying to be allowed to remove these slaves from *Watling's Island* to *Nassau*, under the power given by the fourteenth section of the statute relating to plantation slaves, intended to be moved from one plantation to another, under the same Government, and belonging to the same person. These persons having no plantation at *New Providence*, but meaning to re-

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move the slaves for domestic uses only, the petition was found not to be within the powers given by the act, and was accordingly refused. In the mean time the mother and son had sent a sloop to fetch the slaves, and they were shipped at *Watling's Island* and brought to *Hog Island*, and there deposited with the slaves of a Mr. *Hall*, for the purpose of being moved on, as circumstances might render practicable. The master says he went back for them the next day, meaning to remove them to another island, and found them gone. It appears they had been brought to the mouth of the port of *Nassau*, and were seized on board the sloop, without any document relating to them, or any explanation given respecting them. Unquestionably, this mode of shipping and unshipping slaves, without authority from the officers of the Customs or from the Government, must come under the general prohibition of the act; and in that broad light such transactions ought first to be considered; and unless any of the special exceptions afterwards allowed by the act can be applied to them, the illegality must remain; and it is not by collateral moral reasonings on the objects or motives of the proprietors, or of the hardships in which the policy of the slave laws may have placed them, that their legal justification can be worked out. If, in this mode of considering the law, the penalty attaches, it is not in the power of the Court to relieve the parties, without doing more mischief, in the general interpretation of the act, than can be warranted by any feelings of compassion for the parties.

The claimant asserts, "that the slaves having been taken on board at *Watling's Island*, *bonâ fide*,

as domestic servants, in attendance on a part of the family of the claimant, their owner, from one island to another, no licence, permit, certificate of registration, clearance, endorsement of clearance, or other like document, was necessary, or required by law, in order to legalize the transmission; and she is advised none of the matters or things confessed in her answer comes within the meaning of the statutes, so as to make the slaves liable to forfeiture or condemnation." This is the broad question; and if this is so, it is a complete licence for slaveholders in *Watlings Island* to ship them, and carry them seven days' sail, or more, without molestation, with all the danger of abuse that must attend a liberty so assumed. The prohibition in the act of parliament is, on the contrary, I conceive, absolute and universal, saving the exception specified in the act; and the only exception attempted to be applied to this case is that allowed in the seventeenth section, relating to domestic slaves attending their masters or mistresses in their voyage or journey; and by the fair construction of this clause the legality of the transaction must be tried. The principle of this exception was much discussed in the *Adelaide*.* Other cases have since occurred in the Court at *Trinidad* †, where a similar attempt to cover the purchase and permanent removal of slaves, under the pretext of domestic attendance, has been repelled, and the principle of the act vindicated, as not capable of being bent and nullified by such false and fraudulent pretences. The same notion of constructing claims, in evasion of the act, on such pretences, seems to be common in this island;

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and is, I presume, adverted to in an opinion given to the claimant by her solicitor, where it is said, "that as she had no lands at *New Providence*, and did not come under the fourteenth section of the act, it was only as domestic slaves she could legally remove them." In the same gentleman's opinion to the Governor, exhibited also in the process, it is said, that "the removal of slaves from one island to another, within the same government, for the purpose of being used as domestics, and not *in transitu* actually attending as such on their owners or masters, is not authorized by the statute." This is undoubtedly correct; and must be understood to qualify the notion of a legal removal in the manner before referred to. The truth is, that the law has not followed up the case of slaves allowed to attend their owners, so as to require them to be returned at any definite time, or to be otherwise sufficiently accounted for; and in this omission I think the act is defective, and parties may take the benefit of the ambiguity, and engraft permanent removal on temporary attendance; and the law may not be able in all cases to detect them. But the exception is not so designed in the act; and I think it is impossible with accuracy to describe the means afforded by that exception as a legal mode of permanent removal of domestic slaves, without an actual and *bonâ fide* attendance on their master.

The exception, in favour of the removal of domestic slaves, was not intended to legalize the permanent removal of domestic slaves without an actual *bonâ fide* attendance on their master.

The question, which I proceed to consider, is in what sense these slaves were shipped as domestic slaves attendant on their master. There are two counts in the information charging intention to sell, which have been negatived, as not proved; though there are traces of a conversation to that effect, and some other suspicious circumstances.

There is also a count disputing the domestic character of these persons, and alleging that they were plantation slaves at *Walling's Island*, and that it is not competent in the owner to convert them to domestic slaves. The court below rejected that count, and, I think, not improperly, because I am not prepared to say that the clause requiring them to be really domestic slaves, might not be satisfied with their being really used and employed, *bona fide*, in that character; as, I suppose, particular individuals might be found with proper qualifications for such service, though before classed among plantation slaves. I will say no more on that point, however, than that no strictness which I have yet had occasion to apply to the consideration of the act, induces me to think such a construction would not be consistent with the act. The last count alleges the general illegality of the transaction; and on this count, the removal alone, without other aggravating imputations, is, I think, put in issue. The question arising on it is, in what sense were these persons shipped as attendant on the master, and under what authority? The seventeenth clause provides, that "nothing in the act shall prevent any slave, being really and truly the domestic servant of any person, &c., from attending such master by sea to any place whatever; nevertheless, under the following regulations." Then follow regulations relating to certificates, &c. Now the first thing required is the act and intention of shipping persons in that character; and then the observance of the forms prescribed for doing it, to prevent fraud. In the present case, how can it be said or believed there was any such act or intention at any time entertained or expressed? The mas-

THAT SLAVE.

July 6th
1882.

THREE SLAVES.

July 6th,
1832.

ter gives no account of it. The sloop had been sent down for these slaves before it was thought necessary to have recourse to this expedient; and there had been no communication afterwards. The master describes the slaves as playing about the plantation, and says they were taken on board the sloop and carried to *Hog Island*: there they were deposited with the slaves of *Hall*. The son seems to have given no directions, and made no claim to the special services of these persons when they came to *Hog Island*. He went away, requiring no slave to attend him. It is true, he had been on board; but it is putting the cart before the horse to say they were attendant on him; on the contrary, he seems to have been attendant on them, for the purpose of superintending the clandestine management of these slaves, till it could be known whether the Governor's licence had been obtained. It is not till the ninth of *June*, when these slaves were on their passage, that a letter from the claimant to her son is written, in which the advice is given, which was never received, and therefore could not have been acted upon. It is in that letter suggested, apparently as a new device, "If you are coming down, call into *Cat Island*, and your uncle can clear them out as your *domestics*, without troubling the Governor." How is this consistent with the supposition that the son had shipped them, or used them in that character in the former part of the voyage, even in the apprehension of the claimant herself? I think this pretence is completely refuted by the act of the parties.

Then as to documents. It is not pretended that any certificate of registration had been obtained; but it is said there was no custom-house, and

a subsequent act has provided for such cases.* But it has required certain substitutes, and they also are wanting; and it is said also there were no means of obtaining these certificates. If that were so, I am not prepared to say that the parties were thereby remitted to their natural liberty, and freed from the obligation of observing the general prohibition of the statute. I think, on the contrary, that the parties are bound to observe the general provisions of the act, if particular circumstances prevent them from availing themselves of all the exceptions that might be applicable to their case. In the present case I think there is no excuse for that plea; for I am persuaded the party never thought of using these slaves as attendants on his person. That was a mere nominal pretence, and not resorted to till after the offence had been committed. I feel myself, therefore, to be under the necessity of rejecting the claim, and of condemning these slaves. As the case is under peculiar circumstances, and there is some reason to impute the contraventions of the act to ignorance rather than to design; and as it was brought here to try the law, I shall not throw the costs on the claimant.

Slaves condemned:

THREE SLAVES.

July 6th,
1832.

Parties are bound to observe the general prohibitions of the statutes respecting the removal of slaves, if accidental circumstances prevent them from availing themselves of the exceptions applicable to their case.

* 9 G. 4 c. 82. s. 2. See *infra*, the slave *Duncan*, p. 435, 436.

Nov. 13th,
1832.

NEW PHENIX. BARTON.

Loss, arising from the gross negligence of a mariner, may be set off against a claim for wages.

THIS was a claim for wages, amounting to 8l. 19s. 9d., at the suit of *Joseph Witted*, the second mate of a vessel employed in the *West India* trade. The summary petition, after the usual averments, referred to the ground on which payment had been refused, and described the ground of refusal as occasioned by an accident abroad, arising from the breaking of a rope, while in the act of lowering down a hogshead of sugar, in *Jacks Bay*, *Annatto Bay*, from the wharf, owing to which it fell overboard, and was damaged: it was further asserted, that the accident happened in the presence and under the superintendence of the wharfinger. For the owners an allegation was offered, denying that the wharfinger was present, and pleading that it was the custom of the trade that the wharfinger should be answerable for losses happening to the sugars in shipping under his care. The allegation charged the loss as arising from the gross negligence of the mate, in proceeding to take the sugar on board in the absence of the wharfinger, and without due attention to the working of the crane*, by which the damage

* The plea was to this effect: "That *Witted* and others, by his desire, lifted the hogshead by heaving on the crane; that *Witted* having cried 'High enough,' and shoved the hogshead clear of the wharf, called out 'Lower,' when a man took hold of a rope, used as a stopper for the said crane in lowering

was said to have occurred. It further pleaded, that from the loss so accruing to the owners of the cargo, a deduction of freight had ensued, which the shipowners were entitled to set off against the wages. The allegation also contained a charge of misconduct, in lading the sugars at an improper time in the evening, although the boat could not safely have ventured to get out of the bay till the next morning. This latter averment was opposed as irrelevant, and the Court eventually directed it to be expunged.

NEW PRACTICE.

Nov. 18th,
1882.

The *King's Advocate*, for the mate, did not deny that compensation might be claimed for loss occasioned by gross misconduct or negligence; but he argued, that the loss, in this case, was owing to a mere accident, which happened in the presence of the wharfinger.

Addams, for the owners, denied the truth of the mate's statement, and contended that he was liable for the loss to the amount of his wages, on the known principles of the maritime law, recognised in all books of authority. *Abbott on Shipping*, 5th ed. p. 472.

COURT. The principle is undoubted, and too important to be lightly treated. It has been generally recognised in all books on maritime law*,

goods, and let go the wheel, when the stopper rope, not having been made fast at the other end, gave way, and the wheel running round with great velocity, precipitated the bowshead upon the deck of the boat, and thence into the sea."

* See *Laws of Oleron*, art. 10.; *Consolato du Mare*, c. 247. Also *Articles of Wisbuy*; and *Les Us et Coutumes de la Mer*, p. 150., in which loss by the negligent use of the ship's ropes is incidentally noticed.

NEW PHOENIX.

Nov. 13th,
1832.

and particularly in the King's Bench, in the cases cited in Lord *Tenterden's Treatise on Shipping*; and it is the duty of this Court to uphold it, if sufficient grounds are laid. The Court, therefore, thinks that those parts of the allegation which plead the custom of the trade as to the responsibility of the wharfinger, with respect to goods shipped under his care, the shipping, in this instance, in his absence, and without proper attention, and the anxiety expressed by the mate to conceal what had been done, and his subsequent declarations to one of the crew, may be strictly pertinent; and if the case is proved to that effect, it may support the defence of the owners, and may entitle them to withhold the wages in compensation for a loss so occasioned.

The allegation was directed to be reformed.

Nov. 20th,
1832.

BODDINGTON'S. NOYES.

The report of the registrar and merchants — disallowing, as irregular and unusual where there is a bottomry premium, a charge of insurance on money advanced to the master on bottomry, and forming part of the amount of the bond, — confirmed; bottomry bonds, given

THIS question arose upon a bottomry bond, given at *Calcutta*, in which an insurance of 3 per cent., purported to be guaranteed by the bond, had been disallowed by the registrar and merchants. The case came on in objection to the report, upon act on petition and affidavits.

The *King's Advocate* for the bondholders.
Dodson contra.

JUDGMENT.

Sir *Christopher Robinson*. — This is a question relating to the charge of insurance, on a sum of

money advanced on bottomry, and forming part of the amount of the bond. The registrar and merchants have disallowed it, and the case now comes on in objection to their report. The ship had met with an accident in the *Hoogley* river, which obliged the master to put back to *Calcutta* for repair; and a sum of money was borrowed on bottomry to discharge these expenses. The bond was given for 2218*l.*, and there is no dispute as to the principal sum; but it appears from the accounts, that a sum of 86*l.* was not applied to the use of the ship, but was expended, or allowed on account with the lender, as a premium of insurance at 3 per cent. on the amount of the bond. No policies are produced, and it does not appear distinctly whether the master or the bondholders actually insured, or whether the bondholders were to stand their own insurance on that allowance.

The master, in his affidavit, states "that it was agreed between him and the bondholders, that if the premium should be no more than 12 per cent. per annum, he (deponent) would pay the expense attending the insurance of the ship to the amount of the bond; that the sum for insurance, in consequence of his being without funds, was also embodied in the bottomry bond, as appears in the account." I do not exactly understand what the master means by "*embodied in the bond*," since the instrument itself describes the whole money to have been expended in necessary and indispensable repairs, and supplies, which is a very accurate definition of the proper application of money so borrowed; and, as to *its appearing "in the accounts,"* they cannot properly be identified with the bond, though they relate to it. On the trans-

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by the master, binding the owners only for sums necessary for repairs, and for the furtherance of the voyage, and maritime interest being only allowed as a compensation for maritime risk.

BONNINGTON'S.

**Nov. 30th,
1832.**

action so explained, the sum charged for insurance has been disallowed "as irregular and unusual, when there is a bottomry premium." And the report adds further, "that it is disallowed expressly on account of irregularity, as a fixed premium of 12 per cent. for the voyage would have been deemed a reasonable rate, and have come to more than the sum now charged."

The report is objected to on the part of the bondholders, and the Court is asked to allow this sum of 3 per cent., in addition to the premium stipulated in the bond; and it is said, that the Court may do this, although the registrar and merchants might be bound by the rules observed in ordinary practice. Upon enquiry, I do not find that many instances have occurred in which such an item has appeared. In the *Rhadamanthe*, 1 Dod, 201., in 1813, the insurance was disallowed, and the parties acquiesced; and I do not find that there has been any case in which such a charge has been brought to the notice of the Court. The inference to be drawn from this paucity of precedents, however, is by no means favourable to the claim, because it shews that there is no solid ground for the exception, and that this species of contract can go on very well without it. On the other hand, great inconvenience must inevitably ensue both in this Court, and in other courts which are guided by its rules, if the established practice is disturbed.

It is said that *M'Intosh* and Co. have a just claim on the Court to make this addition, that they may not suffer by an insufficient premium, and that no essential principle of bottomry would be violated by such an allowance. On this point I am by no means satisfied. It is to be recollected,

that this is a bottomry bond executed by the master of the ship, who has no power to bind the ship or the owner by the law of *England*, except within special limits — for repairs and supplies becoming necessary from the exigencies of the voyage. This is an essential principle of this species of bottomry, and the Court has hitherto acted with great strictness in not extending the privilege of bottomry against the ship beyond these limits, confining it to sums necessary for repairs, and for the furtherance of the voyage.

Another essential principle of all bottomry is, that maritime interest is allowed only as a compensation for maritime risk, which usually attends advances of this kind. The advance of the sum in question was not necessary for the furtherance of the voyage, nor was it made under that representation; and it is in no manner subject to maritime risk. I do not see, therefore, with what propriety it can be introduced into a bond that is to bear maritime interest. Since the introduction of insurance, lenders on bottomry, if not restrained by special regulations, may insure their own advances in a distinct contract on their own account; but it would be contrary to the essential character of bottomry to make it a part and condition of the bond; and after hypothecating the ship in maritime interest for maritime risk, to hypothecate it also, in the same bond with the same interest, to take off that risk by other collateral engagements. This is contradictory in form, at least, and I think in principle.

I am not prepared to enter into the consideration of all the consequences that might attend such a change of practice as is now applied for; because

BODDINGTON'S.

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1832.

Lenders on bottomry, if not restrained by special regulations, may insure their advances in a distinct contract on their own account.

BODINORON'S.

Nov. 20th,
1832.

nothing has been said upon them, and because it is an intricate subject, and may more safely be left to mercantile men. In the present case the premium is low, and the rate of insurance also; and if there has been any mistake, the Court might wish to relieve against it: but, in time of war, both the premium and the insurance would be high, perhaps 30 or 40 per cent., or even more, and the consequences might be very different. The settlement of such accounts would, at least, be complicated; and much ambiguity and uncertainty would be introduced by any change of practice on this point in a contract, which ought to be kept as simple and uniform as possible.

If this article of expenditure is not properly a subject of bottomry, it cannot be made so, as I have before observed, by the mere agreement of the master; and I repeat the observation, because I think I perceive traces of a different notion prevailing on this point in *India*, both in this agreement, and also in the bond, in the case of the *Reliance* now depending, in which the master actually stipulates in the bond, that he has the power which he has exercised. This is an additional reason, why the Court should be very guarded in adhering to the rules and principles which have hitherto been observed on this species of bond. If a bond should appear with such an exception given by an owner himself in a foreign country, as might happen, the case might be different, or the question perhaps would not be raised: but, with reference to the present bond and the facts of this case, I think it my duty to adhere to the limits which have hitherto been assigned to the master's power in bonds of this description; and I, therefore, confirm the report.

The Slave DUNCAN.

Dec. 6th,
1832.

THIS was an appeal from the *Bahama* islands: and the cause was originally instituted upon an information filed at the instance of the searcher and waiter of the customs for the port of *Nassau*, alleging, in substance, that the above slave had been shipped in that harbour for removal, in violation of 5 G. 4. c. 113. ss. 14. 17. A claim was interposed by Mr. *Lightbourn*, a merchant of *New Providence*, on behalf of Mr. *Taylor*, of *Ragged Island*; and the slave was restored. From this sentence an appeal was prosecuted on the part of the Crown.

Phillimore in support of the sentence.

The *King's Advocate* contra.

JUDGMENT.

Sir *Christopher Robinson*. — This is an appeal from the Vice-Admiralty Court of *New Providence* against a sentence of restitution of a slave, in a prosecution under the Slave Abolition Act. It appears that a ship, the *Wellington*, cleared out from *Nassau* for *Cuba* on the 14th of *June* 1831, and sailed on the 16th. After the vessel had sailed, the searcher of the customs discovered that the slave *Duncan* had been put on board on the 15th, and had been relanded on the 16th; and on that ground a seizure was made of the slave at the public workhouse, which seems to be a place of deposit for slaves, and where this slave had been placed by Mr. *Lightbourn*. The information or

On appeal from the restitution of a slave, the alleged property of *A.*, to whom he had only been just transferred, and shipped for removal from *Nassau* to *Ragged Island*, within the same government, on board a vessel cleared for *Cuba*, but (the Governor's licence, which had been applied for, not having been received,) relanded, and subsequently seized, the Court affirmed the sentence, but without costs, holding that the transfer, though suspicious, was apparently valid and legal; that the shipment was *bond fide* for *Ragged Island*, and contingent on the obtaining a licence, and that the bare shipment did not work a forfeiture, the intention of removal without a licence being negatived by the relanding.

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libel, contains six counts, varying the charge in every possible way, and, I think, very much to the disadvantage of the prosecution; for there appears to be only two real points in the case: — first, whether the asserted ownership of *Taylor* was liable to be disputed; and, secondly, whether the circumstances under which the shipment was made on the 15th were a violation of the Slave Abolition Act, and came within the penal provisions of that act.

The facts, on which the claimant relies, are as follow: — he states “ that he, *Lightbourn*, was the agent of *Taylor*, and that the slave belonged to him, and had been his property for some time, but before the slave was put on board the ship, in *June*, he had agreed to sell him to *Taylor* for a valuable consideration, but for a long credit, and in pursuance of that agreement *Taylor* had required *Lightbourn* to send the slave to *Ragged Island*; that *Lightbourn*, having on the 14th of *June*, executed a bill of sale, addressed an application to the governor for a licence to ship the slave to *Ragged Island*, to *Taylor*, who possessed an estate there, and plantation and a manufactory of salt*; that on the 16th (though the licence is dated the 17th), he received a licence from the governor; that the slave was carried on board on the 15th, *Lightbourn* expecting to receive the licence, and having no reason to apprehend that it would be withheld; that the slave was put on board a

* The certificate of registration stated, that on 1st of *January* 1831, the slave *Duncan* was registered as the property of *W. Lightbourn*, now the property of *A. Taylor* of *Ragged Island*.

vessel ready to sail immediately to *Ragged Island*, and from thence to *Cuba*; that the sole intention of *Lightbourn*, in carrying this slave boy on board the vessel, was to convey him to that island, if he could obtain a licence and not otherwise; and that there was no purpose or intention on his part, or on the part of any other person, that the slave should be taken further, or landed in any other place than *Ragged Island*, or otherwise dealt with or disposed of; and, therefore, he denies that the slave was shipped, as alleged, with the intention to carry him to *Cuba*: that the master becoming impatient to proceed on his voyage, and the licence not being obtained, the slave was relanded from the vessel and taken to the public workhouse, and it was only some time after the slave was lodged there, and the ship had sailed, that the seizure was made."

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With reference to this history, which is verified by the affidavit of Mr. *Lightbourn*, the first count of the information pleads simply the shipment on board the vessel, cleared for and bound to *Cuba*, in order to his being treated and dealt with as a slave. I do not perceive any clause in the act which relates to shipment, without "the purpose of carrying away and removing," or that there is a prohibition of shipment without that purpose. The third section, which imposes the forfeiture of the slave, certainly requires that averment. The effect of the observation is slight; it only shows that the count is not very necessary, and not in the terms of the act of parliament. The second and third counts amply supply the averment; and, therefore, the real question on this first part of the case, respecting the suggested destination to *Cuba*,

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is, whether there is proof of a shipment for the purpose of removing and carrying away this slave to *Cuba*. There is no positive proof offered; neither the master of the vessel, nor any of the sailors have been produced to prove any thing done or said relative to a removal to *Cuba*. There have been no proceedings against the ship, or owner, or master, as there might have been if they were privy to such a purpose. The evidence rests on the clearance and sailing for *Cuba* on the 16th, and on the entry inwards of the vessel again from *Cuba* on the 27th, implying that she had gone to that island; and there is the circumstance, that no mention was made to the custom-house officers of any intention of touching at *Ragged Island* to take in a cargo of salt, as suggested, or for any other purpose. This is the effect of the proof, resting entirely on inference, on that part of the case. There is no proof whether the vessel did go to *Ragged Island* or not; and if she did not, it furnishes a very slight inference, if any, that she might not have gone there, if this slave had proceeded in her; for *Ragged Island* lies in the old *Bahama Channel*, in the course to *Cuba*, and I presume the slave might have been delivered at *Ragged Island* without any material deviation from the course to *Cuba*; whether she should touch at *Ragged Island* or not, might depend upon the fact whether or not the slave was on board.

This is the whole of the evidence as to *Cuba*; and it is enough to discredit it, to say that it is not the best evidence that might have been produced; because the master, or the mariners, might have spoken to the fact; or there might have been some positive evidence of an intention to send the slave

to *Cuba*, as affecting the person who put him on board; without which the Court cannot trust to the effect of the mere inference drawn from the clearance of the vessel, and from the fact of her going to, and returning from, *Cuba*. On the other side are all the inferences to be drawn from the *res gestæ* of the case, as detailed in the documents in the claim: first, the oath of a very respectable person, Mr. *Lightbourn*; secondly, the grave applications which were made to the Governor, and through him to the Attorney-General, exciting the attention of the public authorities to the fact that this slave was intended to be shipped and sent away; and all this machinery is supposed to be employed to mask the purpose of sending this boy to *Cuba*. It is, I think, a very improbable and incredible suggestion, that it was intended to send him to *Cuba*; when it appears there was employment for him at home well suited to his qualifications. The weight of the evidence from inference, therefore, preponderates very strongly against the probability of his destination to *Cuba*. The Judge in the Court below appears to have dismissed this count of the libel with very few observations; and I think the more it is examined, the more improbable it appears; and it is my duty to dismiss it likewise.

The counts relating to a destination to *Ragged Island*, bring under consideration the state of the property; and here, again, one count very unnecessarily lays the property merely negatively, as not being the property of *Taylor*, whereas it is clear that the slave belonged to *Taylor* or *Lightbourn*: the other counts describe the slave as the property of *Lightbourn* or of *Taylor*; and I think

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this was, at the outset, a most important part of the case; because if there has been any contravention of the act, as to this requisite of ownership, it is one of falsehood, fraud, and clear illegality, and could not have been investigated too minutely on the island, where it could be done more effectually than I can do it now. There was certainly enough to justify a very grave suspicion on that point. But what is the proof in the case, as it stands before me? There is the fact that the slave recently belonged to *Lightbourn*; that the asserted transfer was only completed on the 14th, and that the entry in the workhouse-book described the slave as the property of *Lightbourn* on the 15th and 16th. On the other side, there is the oath of Mr. *Lightbourn*, who swears that the slave had been transferred to *Taylor*, and a more official entry than that in the workhouse-book, — the entry in the Registry, which describes the slave as having been transferred to and as belonging to *Taylor* on the 14th. There is no concealment in any part of the case; the Registry is, I presume, an office of public access, and all would know what was done in regard to such a matter as this.

As to the contradictory description of the slave in the book of the registry and in that of the workhouse, where he was described as the property of *Lightbourn*, I do not know by whom that was done. It appears that the slave was a considerable part of the year in the workhouse as a runaway, and, therefore, might be known as *Lightbourn's* slave; but there is no proof from whom that description came. There is, also, in opposition to this inference, what I think very important, a re-

ference to the asserted ownership of *Taylor*, in the opinion of the Attorney-General given on the 16th, and treating it as a credible fact with respect to the legality of the contemplated removal of the slave, so purchased, from *Nassau to Ragged Island*, on the supposition of its being a *bonâ fide* and valid purchase. This is not insignificant in a case of this description; and there is also the testimony of the secretary of the governor, Mr. *Nesbitt*, "that *Lightbourn* had always borne a character for uprightness, integrity, and general respectability." Such testimony must ensure the respect of this Court to the averment of a person of such character, on his oath.

On this evidence, it is impossible that this Court should not hesitate to judge harshly on the question of property, which it has no means of investigating further. Being without information even as to the common forms of transferring slaves in the island; and seeing that the question was so little agitated in the court below, that the learned Judge does not notice it, in the imperfect account which the public papers of the island give of his judgment, I think it is my duty to adhere to the view he seems to have taken of the case, and to consider the property, as the Attorney-General considered it, in his opinion, as legally transferred to *Taylor*.* There is enough to justify suspi-

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* In the process transmitted from the *Bahamas* was a letter, dated 16th of *June* 1831, addressed to the Governor by the Attorney-General of the islands, on the subject of the removal of the slave *Duncan*. The letter, after reciting 5 G. 4. c. 113. s. 13., thus proceeded:—"In this section the word 'island' means, I apprehend, the entire colony; and therefore a slave sold in one island of the *Bahamas* may be lawfully employed or worked in any other of them, the whole of the *Bahamas* being only one island for the purpose of the sale and purchase of

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cion ; but as I have no evidence of the customs of the islands respecting the transfer of slaves, I think I ought not to agitate this question further, but, to defer to the opinion respecting the property, as entertained by the Attorney-General, and confirmed by the decision of the Judge in the court below.

Then, as to the shipment so explained, with reference to the acts done by Mr. *Lightbourn*. The third section of the act specifies the purpose of removal as the essential character of the offence. The shipment alone might, perhaps, have sustained a presumption as to the intention of removing, and if that had stood doubtful at the time of seizure, it might perhaps not have been competent to parties to aver against that presumption, or to explain it away by collateral acts. But when the purpose is established to the contrary, by the re-landing of the slave and the departure of the vessel, the case assumes a very different aspect; and the Court must hesitate to stand on mere irregularity in what has been done, in opposition to the real substantial character of the transaction. There seems to have been a confident anticipation

slaves in the section alluded to. I am also of opinion that if the owner of a plantation, situate in any island within the *Bahamas*, happens to be at any other island where slaves are exposed for sale, he may lawfully purchase them *bonâ fide* for the purpose of removing and employing them on his plantation, upon which he resides, and that under section 14. a licence may properly be granted for that purpose. Mr. *Taylor*, the petitioner, states himself to be a salt-raker; the raking and manufactory of salt is a laborious but a lawful employment for slaves; and as section 13. does not define in what work slaves shall be engaged when so bought or sold, I think the act will allow of the slave's removal to his new purchaser's plantation, although he may be occasionally employed in the manufactory of salt."

of a licence being obtained to export the slave to *Ragged Island*; and he was put on board on the night of the 15th, instead of waiting till the 16th, when the licence was signed and issued. There was confusion and irregularity undoubtedly in this; but there is no doubt remaining on my mind that the shipment was made for *Ragged Island*, and contingently on the expectation of obtaining a licence, which had been applied for on the 14th, before the shipment; and I think, under that explanation, and with reference to all the circumstances of the case, it does not sustain the purpose required by the act of a shipment for the purpose of removal, in violation of the act.

With regard to the certificates which are required by the fourteenth section of 5 *Geo.* 4. c. 118. they are to be obtained before the slave is removed or embarked "for that purpose." That is the form and order prescribed for things remaining to be done under the licence. But they had become in this case impossible, by a course of events that impute no fraud or negligence to the party; we are reasoning, not on the effect of the licence as used, but as to the effect of the application for it, as qualifying the purpose of shipment. These omissions do not discredit the purpose or intention, and I think they do not otherwise affect the transaction.

It is not improper that I should notice, perhaps, what appears in the Judge's sentence, that the situation of these islands is so peculiar, that even legal persons did not, before the late arrival of the statute 9 *Geo.* 4., apprehend clearly that the removal of slaves from one island to another was subject to the restriction of the general act.*

* The following extracts from the report of the judgment of the learned Judge of the *Bahamas*, are copied from the

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This misapprehension is spoken of as prevailing at the time of this seizure, with reference to other slaves from *Watling's Island*, seized at the same time, and since condemned; and in that case the Court saw in the proceedings some indication of that ignorance as to the law, though it hardly knew how to deal with it. * It would be difficult to say now what weight could be attributed to such an

Bahama Argus of September 10. 1831:—“ When this statute, 5 G. 4. c. 113., was first passed, the fourteenth clause was not considered here as extending to the *Bahamas*, which are all under one Governor and one Legislative Body, but to such islands as *Nevis*, *Anguilla*, and the *Virgin Islands*, where separate legislative bodies exist, and different laws prevail, although they are under the general government of the Captain-General and Governor-in-Chief of the island of *St. Christopher*; and this opinion appeared to be strengthened by the consideration that *outward* clearances and certificates of registration did not appear necessary in the case of slaves removed from one part to another of the same island, or from one island to another in the same colony. The *Bahama* government extends over several hundreds of islands, or keys, some of greater and some of lesser magnitude; and almost every parish includes several islands and keys. It was therefore supposed that when the inhabitants of *Jamaica*, *Barbadoes*, &c. possessed under the statute the unrestrained power of removing their slaves at pleasure from county to county, and from one part to another of the same island, without licence or permit, none could be necessary to enable the inhabitants of these islands to remove their slaves from one part to another of the same parish. The 9 G. 4. c. 84., ‘ An Act to continue an Act for amending and consolidating the Laws relating to the Abolition of the Slave Trade,’ has been subsequently passed: Looking at the provisions contained in sect. 2. of that act, the governor’s licence has since been deemed necessary for the removal of slaves from one island to another within the *Bahama* Government, for the purpose of cultivating the plantation belonging to the said proprietor; and he should consider this to be the true construction of the act, until he was otherwise advised by the decision of a Court of Appeal.”

* See the *Three Slaves*, *suprà*, 419.

excuse in any case of a clear violation of the act. All seizures under this act should be cautiously made; and all proceedings liberally, and not, on that account, less efficiently conducted, on the part of the prosecution. But owners of slaves, and their agents, ought also to act with great caution in all things connected with this very prohibitory statute: they cannot be too strongly admonished not to reason rashly, as they have sometimes appeared to do, in disregard of the strict observance of the regulations of the act: for it is with great difficulty that courts of justice can make allowance for ignorance, or error, that might have been avoided, or for culpable, though, perhaps, undesigned, irregularities and omissions. With reference to such facts as compose this case, a state of doubt as to the law, so prevailing at the time of the transaction, is an additional claim to a favourable interpretation of the conduct of individuals, and increases the satisfaction I feel in being able to concur in the sentence of restitution pronounced by the Court below.

The Slave
DUNCAN.

Dec. 6th,
1832.

With respect to the costs, I perceive that the Judge gave the costs of the claimant against the prosecutor, and declined to certify for a probable cause of seizure. I do not concur with him on that point. I think the claimant might very justly have been left to bear his own expences in one instance: I shall so leave it. And as it may, perhaps, be convenient not to disturb the sentence in any respect, I shall not make any order as to the costs of the appeal.

Sentence affirmed.

Dec. 23d,
1831.

The LORD WARDEN and ADMIRAL of the
CINQUE PORTS *v.* H. M. in his OFFICE
of ADMIRALTY, &c.

(*In the Matter of a Whale.*)

Royal fish
"found and
taken within
the precincts,
limits, liberties,
or jurisdiction
of the Cinque
Ports, or their
members,"
belong to the
Lord Warden.

IN 1829, the Masters and crews of seven oyster
smacks having discovered a whale three miles
from the shore, towed it on to *Whitstable* beach.
The expenses of converting this whale into oil,
and storing it, amounted to 370*l.*, — the value of
the produce.

The smacksmen wished either that the oil should
be condemned to them, or that it should be sold,
and the accounts defrayed out of the proceeds.

A warrant having issued under seal of this Court
for the arrest of the whale, oil, blubber, and bones;
and citing all persons to show cause why the same
should not be condemned as perquisites of the
Lord Warden, a claim was entered for the smacksmen,
and an appearance given on behalf of H. M.
in his office of admiralty.

The Lord Warden alleged, that "all wrecks of
the sea, merchandize, and effects flotsam, &c. &c. or
derelict, together with all fees, emoluments, profits,
perquisites, and other advantages whatsoever to
the offices of Constable of *Dover Castle*, Lord
Warden, Chancellor, and Admiral of the Cinque
Ports, two ancient towns, or their members, for
80, 90, or 100 years last past, and during the time
whereof the memory of man is not to the contrary,
have belonged and still do of right belong to the
Lord Wardens and Admirals of the Cinque Ports,
and so belong to the present Lord Warden and

Admiral thereof; and further alleging that the said whale, oil, and blubber, the produce thereof, (being found and taken within the precincts, liberties, limits, or jurisdiction of the Cinque Ports or their members,) in case the right and property thereto cannot be made to appear by some person claiming the same, will belong to the present Lord Warden and Admiral of the Cinque Ports."

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It was alleged, *contra*, that in the patent, (under the great seal of *England*,) dated the 15th of *July* 1829, and by which certain commissioners were appointed for executing the office of High Admiral of the U. K. of *G. B.* and *Ireland*, and of the dominions, islands, and territories thereunto belonging — it is recited: "Whereas all wrecks of the sea, goods and ships taken from pirates, and divers droits, rights, duties, and privileges, have been by express words, or otherwise, heretofore granted to our said High Admiral, and to former Admirals, for their own benefit, as duties appertaining to the office of our High Admiral; our further will and pleasure is, and we do hereby charge and command that all casual duties, droits, and profits be taken, collected, and received in all places where they shall happen by the Vice-Admirals and other officers of or belonging to the admiralty, in such sort as they formerly were or ought to have been taken, collected, and received by them, and every of them respectively, when there was an High Admiral of *G. B.*; and the said Vice-Admirals and others so taking, collecting, or receiving the same, shall account for the same unto or before you, our said commissioners, or as you shall appoint, but to our only use and behoof and not otherwise." Further alleging, that "all royal fishes,

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such as sturgeons, grampuses, whales, porpoises, dolphins, riggs, and generally all other fishes of very large bulk or fatness were expressly granted and conveyed. That wheresoever the whale, now proceeded against, may have been taken, there is no grant made in and by the patent for the office of Lord Warden and Admiral of the Cinque Ports of any royal fishes whatever; that in 1762, five whales having been taken within the jurisdiction, and proceeded against in the Admiralty Court of the Cinque Ports, as droits and perquisites of the Lord Warden and Admiral of the same, were claimed as droits and perquisites of H. M. in his office of admiralty; and, on the 1st of *March* 1768, a proxy under the hand and seal of the Duchess Dowager of *Dorset*, as executrix of *Lionel* late Duke of *Dorset*, the late Lord Warden and Admiral, was exhibited, renouncing her right to the whales, and the same were with such consent, and also with the consent of the Earl of *Holderness*, the then Lord Warden and Admiral of the Cinque Ports, condemned to H. M., as droits and perquisites of H. M. in his office of admiralty."

The claim of the fishermen to be remunerated according to the judgment of the Court was admitted.

Addams for the Lord Warden.

The *King's Advocate* and *Dodson* contra.

JUDGMENT.

Dr. *Phillimore*.—These proceedings are instituted for the condemnation of a whale, which some months back was discovered off the coast of *Kent* by several fishermen who were employed in dredging for oysters, and which by their skill and

perseverance was driven on shore in *Whitstable Bay*.

The transaction clearly occurred within the jurisdiction of the Cinque Ports: and accordingly the officers of the Lord Warden, who is also the Lord Admiral of the Cinque Ports, took the proper steps to lead to the condemnation of the whale in this Court of Admiralty: on the other hand, the fishermen, by whose activity and address the animal had been stranded and secured, gave an appearance in the cause, and claimed salvage for their services. An appearance was also given on behalf of the Lords of the Admiralty, who claimed condemnation of the whale to themselves as a droit and perquisite of the King in his office of admiralty.

The right of the Sovereign to royal fish, by which appellation whale and sturgeon are characterized, is a right to which our ancestors attached much importance: and it has descended to our times as clearly established as any of the prerogatives of the crown. We do not go so far as to assert, as some have maintained, that the right is founded on the claim of the King of these realms to the sovereignty of the seas from which the whale has escaped; but, from whatsoever source derived, it is the undoubted law of this realm, (and in this, I apprehend, the claim for salvage originates,) that a whale, found on the shore, or caught near the coasts, of *Great Britain*, is to be considered not only as being, but as having always been, the property of the crown — property, indeed, so inherent in the crown, that, by a species of legal fiction, it is to be restored to the king as its rightful owner — *veterem ad dominum debere reverti.* *

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The law on this point being clear, when this case came before the Court on a former occasion, the question of salvage was readily disposed of: neither party, who claimed a right to the whale, contested the claim of the salvors to remuneration, — but the question of who had a right to the whale was one of greater difficulty; and I felt the difficulty so much, that I directed the case to stand over, for the purpose of allowing evidence to be introduced that might tend to elucidate or explain it.

Although the whale may vest in the crown in virtue of its prerogative, yet the sovereign may have transferred, and undoubtedly, from the documents before me, it appears that the sovereign, in this instance, has transferred this ancient perquisite to another person; but the question is, to what person? On the one hand, the commissioners for executing the office of the Lord High Admiral claim it as a right transferred to the high functionary they represent: on the other, the Admiral of the Cinque Ports, who has a right at least to all the perquisites of the Admiralty within his jurisdiction, claims it in virtue of his office. In the patents exhibited of the Lords Commissioners of the Admiralty, no mention is made of royal fish. The grant is of all “duties, rights, and privileges” to which the Lord High Admirals or other Admirals were entitled; but on reference to the patents of the Earl of *Pembroke*, who was Lord High Admiral in the time of *William III.*, and of Prince *George of Denmark*, who held the same office in Queen *Anne’s* reign, they contain the following words: — “Royal fish, viz. sturgeons, grampuses, whales, porpoises, dolphins, riggs, and graspes, and generally whatsoever other fish having in themselves great and immense size or fat.”

So with respect to the Lord Warden. The Duke of *Wellington's* patent grants him "all the commodities, emoluments, profits, and perquisites, in as ample a manner as they have been granted to any of his predecessors." And this is the general tenour of all the patents I have had an opportunity of inspecting; the first of which, in point of date, is that granted by *Charles I.* to the Earl of *Suffolk*, on the resignation of *Villiers* Duke of *Buckingham* in 1628: he was to have the "commodities, emoluments, profits, and privileges thereunto belonging, in as large and ample a manner as *Henry* Earl of *Northampton*, *Edward* Lord *Zouch*, or the Duke of *Buckingham*, or any other before them, held and enjoyed the same."

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What, then, were the privileges and emoluments originally conferred in detail on the Admiral of the Cinque Ports? In the absence of positive evidence, surely there is every presumption that they were, at least, as ample as those conferred on the Lord High Admiral: if so, the question must entirely hinge on the priority of the patent; for it is clear, that if the immunities had been already granted to one Admiral, they could not be parcelled out to the other; *i. e.* if they were first granted to the Admiral of the Cinque Ports, the Lord High Admiral's patent must be held not to include these perquisites when accruing within the limits of the Cinque Ports.

We know that at an early period of our history there were several Admirals of *England*, and that each exercised jurisdiction within his respective boundaries. We know, also, that the Admiral of the Cinque Ports was amongst the most ancient of these Admirals. There can be no doubt, I

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think, but that patents were granted to Admirals of the Cinque Ports (which purported to convey to them the right to whales and other royal fish,) at an earlier date than that of either of the patents to the Lord High Admiral which have been produced in this cause. We have the remarkable testimony of Sir *Leoline Jenkins* to this fact; who, in a charge given at a Session of the Admiralty holden within the Cinque Ports in 1668, after stating that, four centuries back, there were always two or three Admirals in *England*, and that the Admiral of the Cinque Ports was still one, if not the *chiefest*, of them, adds:—"And those great fleets, which these parts did then furnish on all occasions, called and reputed, by way of pre-eminence, the king's navies royal, were still commanded by the Lord Warden or their Admiral, and he had all the authorities, rights, and royalties belonging to an Admiral annexed to his office, as appears by the commissions of *Beauchamp* and *Herle*, who were Wardens and Admirals of these ports in *Edward III.*'s time."* In another part of the same charge, he distinctly refers to the grant of the prerogative in question:—"All fines and americiaments imposed by this Court are the Admiral's. All royal fishes, such as whales and sturgeons, are his."†

In the state in which the Court is left with respect to evidence in this case, I am disposed to place considerable reliance on this authority. Sir *Leoline Jenkins* was a person of acknowledged diligence and industry; and the facts which he stated to the jury on this solemn occasion were

* Sir L. Jenkins' Life, vol. i. p. 85.

† Ibid. p. 89.

probably the result of laborious research, and not unlikely to have been derived from a perusal of those ancient records to which he so explicitly refers. If the facts are correctly stated, they are decisive of the question at issue: and if we look to probabilities, they strongly aid the presumption I deduce from his statement. Is it not as probable that the High Admiral should be excluded from the right to royal fishes within the Cinque Ports, as he confessedly is excluded from the right to wreck, to flotsam and jetsam, within the same limits? The situation, too, of the Cinque Ports, — their exposure to invasion, and the prominent station their Admiral necessarily occupied in the defence of the kingdom against foreign aggression, in my judgment, leads to the conclusion that the office of Admiral of the Cinque Ports is more ancient than the office of Lord High Admiral.

The records of this Court have been searched, and two cases of proceedings against whales have been cited from them. — On the 25th of *November* 1766, the Lord Warden's proctor instituted proceedings against a "*certain whale, spermaceti oil, and blubber thereof, lying at Folkstone.*" On the 30th of *December* 1766, all persons pretending to have an interest in the whale were cited to appear, and a commission of appraisement and sale was decreed, at the motion of the Lord Warden's proctor. On the 14th of *January* 1767, the commission of appraisement and sale was returned; but after this period no mention occurs of the cause in the Court Book.

The information contained in the Court Book respecting the other case is as inconclusive as that in the case just cited. The case is headed *The*

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Lord Warden and Admiral against Five Whales lying at Deal, Broadstairs, and Birchington; and the first mention that occurs of it is as follows:—

“*Grosvenor*, one of the proctors of this Court, appeared on behalf of the Duchess Dowager of *Dorset*, executrix of the will of the late Most Noble *Lionel Duke of Dorset*, late Lord Warden of the Cinque Ports, under the hand and seal of the said Duchess Dowager, being a renunciation of her right to the said whales; and consented, on behalf of the said Duchess Dowager of *Dorset*, that the same shall be condemned to the King.”

“*Lane*, on behalf of the Earl of *Holderness*, consenting, the said five whales were decreed to belong, and are condemned, to our Sovereign Lord the King as perquisites belonging to his Majesty in his office of Admiralty of *England*,” &c.

Undoubtedly, in this instance, the condemnation passed to the King in his office of Admiralty; but it is to be observed, that the decision was entirely *sub silentio*; that the Duke of *Dorset*, the Lord Warden, had died during the proceedings, and that his widow, in her capacity of executrix, renounced any right he might have had to this perquisite; there was no argument on the point, and no other decision than that which resulted from a compromise between the litigant parties. These cases therefore furnish no decided authority on which I can safely rely, nor any precedent to guide me to a sound legal conclusion.

Under a choice of cases, this is one of the last that I should have wished to decide, as it relates to the jurisdiction of the Court over which I preside; but other courts have been placed under similar circumstances, and obliged to entertain

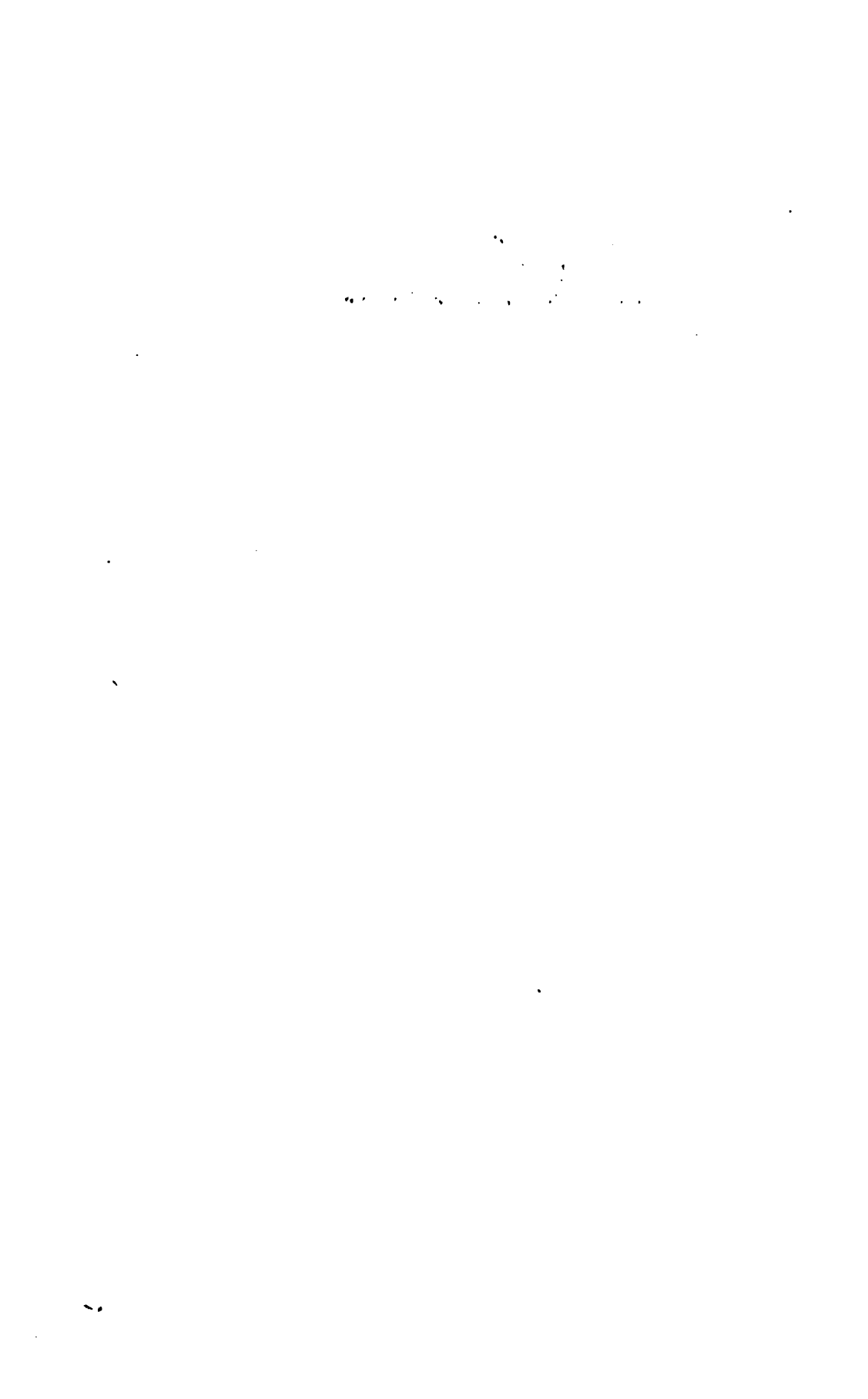
questions respecting their own jurisdiction; and I have laboured in vain to discover any special ground on which I could claim exemption from exercising my judgment on this matter.

From the best consideration that I have been able to give to all the facts and circumstances connected with the claim, I have brought my own mind to a conviction, that the right is in the Lord Warden: and it is a great satisfaction to me to reflect, that, if my judgment be erroneous, it may, and I trust will, be corrected by reference to another tribunal, of which some of the Judges of the Common Law must necessarily form a component part.

The Court pronounced for the jurisdiction and claim of the Lord Warden of the Cinque Ports, and decreed the produce of the whale as salvage.

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I N D E X.

A.

ADMIRAL, (see *Salvage*, 14, 15.)

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————— (Vice), Court of, (see *Appeal. Monition.*)

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1. Protest of the master of a foreign vessel, which being in distress was in tow by the vessel run foul of, rejected, 28.
2. Compensation for consequential damage, 30.
3. Where payment of a sum for damage, interest, and costs, had been delayed by the party liable, further costs and interest decreed, 137.
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6. No appearance being given by the owners of the vessel arrested, sale decreed, 155.
7. Held, that a steam-vessel, being more under command, and manifestly having seen the other vessel, was to blame, 173.
8. Under 1 & 2 G. 4. c. 75., the Court may not only arrest a *foreign* ship, but proceed to judgment. Protest of foreign owner overruled, 183.
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E.

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S.

- SALVAGE, (see *Appeal*, 2, 3, 4. *Insurance. Pilot. Prac-
tice*, 2. *Prize. Tender*.)
1. Claim of an officer of a coast guard detachment, who did not assist in person, rejected, 1.
 2. Claim of a passenger rejected, 3. *n.*
 3. Salvage for bringing into port a barge found (without anchor or crew), aground, where it was a common usage to leave barges, refused, 3.
 4. The Court of Admiralty cannot, in a case of salvage, allow charges for repairs, 42.
 5. Where vessels sail under an agreement to render mutual assistance, a claim of salvage rejected, 43.
 6. Whether, if a custom to render mutual assistance be established, it would exclude a claim for salvage, 48. *n.*
 7. Where a vessel in distress agreed, for a certain sum, with the master of another vessel for assistance, a claim from the owner for salvage not sustained, 77.
 8. In a case of derelict, a moiety, and the salvors' costs out of the other moiety decreed, 89.
 9. In a cause of military and civil salvage, a valuation, made on the spot abroad, (though no bail given,) not disturbed, 156.
 10. War salvage may, on special services in the nature of civil salvage, be increased, 157.
 11. If the award of magistrates is generally reasonable, the Court will not disturb it. A different rate of salvage for the ship and different parts of the cargo is objectionable, 189.
 12. The certificate of the magistrates under 1 & 2 G. 4. c. 75. s. 9., even if not conclusive of the value, is of great weight. Award affirmed with costs, 195.
 13. The character of agent does not wholly supersede that of salvor, so as to exclude the admiralty juris-

SALVAGE, (*continued.*)

- diction. Salvage decreed in addition to the disbursements, 198.
14. The 6 G. 4. c. 49., and the order in council of *September* 1825, do not apply retrospectively to cases of salvage from pirates made and adjudicated upon before the statute: and the Court cannot, of itself, adopt the principle of constructive salvage. Claim of the Admiral to share rejected, 209.
 15. *Quære*, whether the Admiral's right to share, on a rescue from pirates, under 6 G. 4. c. 49. extends to foreign ships, 213.
 16. All salvage is founded on the equity of remunerating private and spontaneous services, 218.
 17. On appeal from an award the Court allowed a new appraisalment, and gave a fixed sum, together with their costs and losses to each boat according to their respective merits, 257.
 18. The primary object of 1 & 2 G. 4. c. 75. was to provide for small and occasional services, though, under s. 8., it *may* be competent to magistrates to proceed in cases of magnitude, 259.
 19. In cases of civil salvage the Court does not recognize the rule of proportion, (one fourth of the *ship* having been awarded on arbitration), but awards an equitable remuneration for the service, such remuneration being more liberal in cases of large value: contingent losses and the master's particular expenses considered, 262.
 20. Apportionment to the owners, their property being in danger, 264.
 21. Conversations at the time of the service are not conclusive of the merits, 265.
 22. The crew of another vessel on board the wrecked vessel, rather as passengers than as crew, entitled, 269.
 23. Award, as excessive, reversed. Costs of salvors allowed, 323.
 24. Conspiracy, to prevent assistance, is indictable, 337. n.
 25. Apportionment of reward to a *South Sea* whaler. Remuneration to owners, 338.
 26. Right of original salvors. In a case of derelict two fifths given to original salvors, and 100*l.* to a re-

SALVAGE, (continued.)

venue cutter, together with the expenses, out of the remaining property, 361.

SHIP, (see *Collision. Possession.*)

1. Warrant of arrest refused, at suit of a mortgagee, to transfer possession, 181.
2. Conditional assignment of, 305.

SHIP'S ARTICLES, (see *Mariner's Contract.*)**SHIP, TENDER OF, (see *Slave Trade, 6.*)**

1. Tenders, properly authorized, are considered as identified with the ship to which they are attached, 373.
2. The share of a tender (joint captor of a slave vessel with another ship) distributable among the ship's company, 317.

SLAVERY,

1. A domestic slave accompanied her mistress from *Antigua* to *England*, and, after a year, voluntarily returned with her mistress to the place of her birth and servitude: Held, that a state of slavery revived, 94.
2. The 59 G. 3. c. 120. has no reference to the transit of slaves to or from this country and its colonies, 98.
3. Slaves coming into *England* are free there, and cannot be sent out of the country by any process to be there executed, 118.
4. Slavery in the colonies is not the creature of law, but of custom, 127.
5. The law of *England* discourages slavery within the limits of the islands of this country, but gives to it, in its colonies, where it looks on slaves as mere chattels, an almost unbounded protection, 128, 129.

SLAVE TRADE, (see *Joint Capture. Prize Agent. Ship's Tender. Wages, 6.*)

1. The principles of joint capture in prize cases apply to vessels associated in the capture of ships engaged in the slave trade, 31. 38. n.
2. Where the master, unknown to the owners, had received persons on board as *pledges*, the Court, under the circumstances, held, on appeal, that the ship was not subject to condemnation, but allowed the captor's expenses, and the insurance, 159. n.

SLAVE TRADE, (*continued.*)

3. Held, on appeal, that a vessel seized while preparing to weigh anchor, after she had cleared out at *Ireland Island* for *Trinidad*, having on board persons endorsed on the clearance as domestic servants, &c. (with a certificate that there was no registry act in the island), was rightly condemned, 290.
4. 5 G. 4. c. 113. s. 47. is only *indefinitely* retrospective as to *importations*, 271.
5. Importation of slaves, discovered during the voyage to be on board, held not to work a forfeiture under 5 G. 4. c. 113. Undefended sentence sustained, 273.
6. Capture by ship's tender jointly with another ship, 317.
7. Held, that a seizure of a *Brazilian* brig by an open boat (the crew of which was borne on the books of a king's ship, but actually putting off from an unauthorized tender,) did not entitle the ship, under 5 G. 4. c. 113. ss. 67, 68., to share, 366.
8. 5 G. 4. c. 113. s. 71. gives to this Court a jurisdiction, as to the bounties, although a condemnation has passed in the mixed Commission Court, 370.
9. On a seizure of slaves at the *Bahamas*, upon a removal as "domestic slaves," without *licence* and *certificate*, a decree of restitution reversed, but without costs, on appeal, 412.
10. *Semble*, that slave-owners are strictly bound to observe the general provisions of 5 G. 4. c. 113. and 9 G. 4. c. 82. s. 2., 414. 419.
11. *Quære*, whether under 5 G. 4. c. 113. s. 17. plantation slaves, if really used and employed *bonâ fide* as "domestic slaves attendant on their master," would not be protected, 417.
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T.

TENDER, (see *Pilot*, 1. 5., *Ships' Tender*.)

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W.

WAGES, (see *Appeal*, 1., *Bottomry*, 9., *Costs*, *Evidence*, *Log Book*, *Mariner's Contract*, *Witness*, 1.)

1. Occasional acts of drunkenness will not, under circumstances, enure to the forfeiture of a steward's wages, 5.
2. A plea of set-off, in answer to a suit for wages, rejected, 14. *n.*
3. Getting drunk on shore, and not returning on board immediately leave of absence expires, is not an act of desertion working a forfeiture of wages, 15.
4. A man was entered in the articles as second mate, but with no rate of wages affixed, the Court held that such omission let in parol evidence of an agreement, 79.
5. A seaman, who had elected to take a bill of exchange, instead of cash, in payment of wages, cannot sue the ship, on payment of such bill being refused, 136.
6. Though under the principle that freight is the mother of wages, mariners lose their wages by an interruption of the voyage from accident, the condemnation of the vessel for illegal trading (*e. g.* in slaves) by the *master*, does not work a forfeiture of wages, nor bar an action against the owners. Charges of disobedience, neglect of duty, of intoxication and mutiny, not being proved, wages decreed, 158.
7. A single act of intemperance does not work a forfeiture, 168.
8. Forfeiture by conduct amounting to desertion, 221.
9. Owners, having pleaded the desertion of the mariner from another vessel, and the payment of his wages into *Greenwich Hospital*, dismissed. *Seemle*, that it would have been sufficient to allege such facts in acts of Court, 228.

WAGES, (*continued.*)

10. Insolent expressions and acts of mutinous tendency not apologized for, held a forfeiture, 229. *n.*
11. A proposed deviation from the original voyage entitles a mariner to his discharge; and the mariner's subsequent conduct not amounting to consent nor to a virtual renewal of his engagement, wages, to the time of quitting the ship, and costs decreed, though the Court inclined that the mariner had acted illegally in refusing to discharge the cargo, 243.
12. The law of *England*, in ordinary cases, requires the mariner to stay by the ship till the discharge of the cargo, 246.
13. Deviations, proceeding from accident or overruling authority, do not amount to a breach of contract, 247.
14. Defensive allegation on the ground of contraband, 394.
15. gross negligence, 420.
16. Forfeiture by desertion, not protected by entering under 2 G. 2. c. 36. s. 16. on board a king's ship, 403.

WARRANT, (*see Ship.*)WHALE, (*see Cinque Ports.*)

Royal fish belong to the crown or its grantee, 442.

WITNESS,

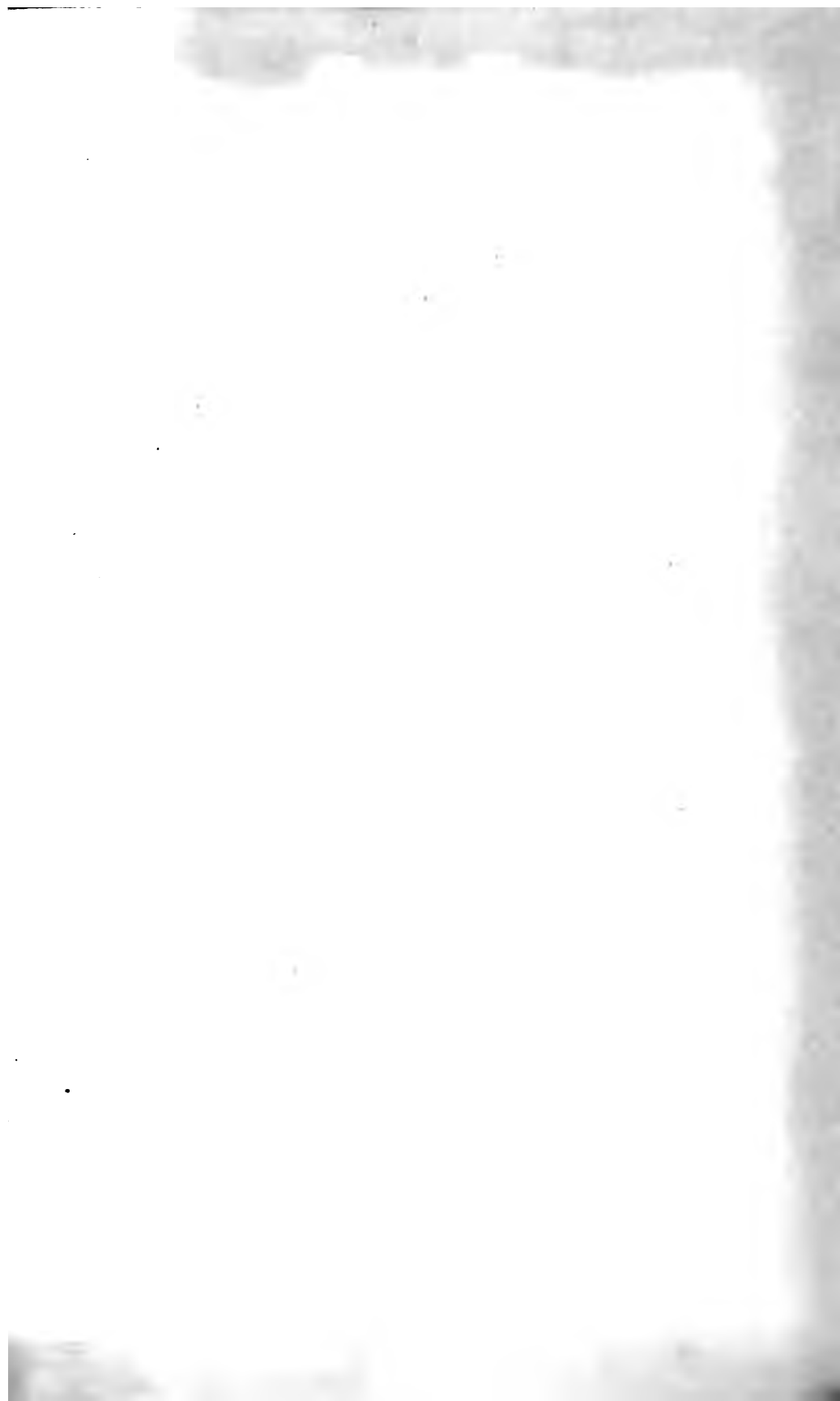
1. In a wages suit, the evidence of the mariner's father, who was responsible for the expenses, rejected, 83. *n.*
2. In a collision cause, the crew of the ship (charged with the damage) admitted, from necessity, 145.
3. In a salvage suit, salvors, on signing releases, dismissed to be examined, 149. 151. *n.*

WRECK, (*see Cinque Ports, 2.*)

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